Supreme Court, U.S.
FILED

No. 96-961740 APR 30 1997

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GESKE & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board impermissibly expanded the rights of non-employee union organizer's to engage in derivative Section 7 protected activity under *Lechmere, Inc. v. NLRB* and *Bill Johnson's Restaurants, Inc. v. NLRB*, by finding an employer's libel lawsuit against a stranger labor union is an unfair labor practice, before the state trial court resolves motions for summary judgment, but after the state trial court has both found the libel tort not preempted by federal jurisdiction and has denied the union's motion to dismiss.

2. Whether under *Lechmere, Inc. v. NLRB* and *Bill Johnson's Restaurants, Inc. v. NLRB*, the National Labor Relations Board may order reimbursement of attorney's fees and costs as a derivative Section 7 remedy in favor of a non-certified "stranger" labor union, whenever its evidentiary scrutiny finds that the employer's state tort complaint against the union is for retaliatory purposes, rather than for frivolous or illegal purposes as set forth in *NLRB v. Food Store Empl., Local 347.*

LIST OF PARTIES

Petitioner Geske & Sons, Inc. is a closely-held, non-public corporation owned by Larry Geske and Leroy Geske. Geske has no parent companies, subsidiaries or affiliates.

The Respondents here are:

The National Labor Relations Board, an agency of the United States and the International Union of Operating Engineers, Local No. 150, an intervenor in the court of appeals.

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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GESKE & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, NO. 150; CHUCK AUGUST, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Geske & Sons, Inc. ("Geske") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 103 F.3d 1366. The Decision of the National Labor Relations Board is reported at 317 N.L.R.B. No. 26. These opinions and

Orders are reproduced in the appendix at pages 1a and 25a,[1] respectively.[2]

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1997. Justice Stevens granted Petitioner's motion for extension of time to file the Petition for Writ of Certiorari to this Court on March 20, 1997 (App. No. A-663), to and including April 30, 1997. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES INVOLVED

Article VI, Section 2 of the Constitution, provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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[1] "_a" references are to the accompanying Appendix hereto. "Tr. Vol." references are to the volumes of the ALJ record.

[2] The related opinions of the Appellate Court of Illinois, Second Judicial District and the opinion of the Circuit Court of McHenry County, Illinois, relied upon by the Seventh Circuit and the Board are unreported and reprinted in the Appendix at 121a and 132a. A Memorandum decision of the United States District Court for the Northern District of Illinois, Eastern Division, is reprinted at page 149a. The companion case ruling of the United States Court of Appeals for the Seventh Circuit in *Zipp v. Geske & Sons, Inc.*, issued the same day as the instant case, is reported at 103 F.3d 1379 (7th Cir. 1997) and is reprinted at 154a. The unreported decision of the United States District Court for the Northern District of Illinois, Western Division, in *Zipp v. Geske & Sons, Inc.*, is reprinted at 163a.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

The Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 151 et seq., is involved in this case.

29 U.S.C. § 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment authorized in section 158(a)(3) of this title.

STATEMENT OF THE CASE

This case presents a recurring question whether the National Labor Relations Board may determine that an employer's state court tortious libel complaint against non-employee union organizers is an unfair labor practice, prior to the state court's pending ruling of the matter on summary judgment, but after the state court has found the claims not preempted and denied a motion to dismiss.

Since this Court's decision in 1983 in *Bill Johnson's Restaurants*, Inc. v. NLRB, 461 U.S. 731 (1983), finding that the Board

must stay its hand and permit an employer to exercise a First Amendment right to pursue state court libel remedies against employees, even with retaliatory motive, the Board has devised different mechanisms to find such an employer lawsuit to violate the Labor Act. In this case, the Board squarely ceases to differentiate between actual Section 7 rights possessed by employees sued by employers and the separate "derivative" and diminished right that this Court squarely ruled applied to union organizers in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992).

The decision below orders Geske and Sons, Inc. ("Geske") to dismiss its state libel lawsuit and to reimburse the union and non-employee union organizers for attorneys' fees and costs they have incurred in defending it. 118a.

Geske is a small commercial asphalt paving and manufacturing contractor operating in Crystal Lake, Illinois, with approximately twenty employees at the time the lawsuit, and is the only open shop asphalt plant in the Chicago area. 2a. Chuck August is a business agent of International Union of Operating Engineers Local 150 ("Local 150").

From August 19, 1991 to September 18, 1991, Local 150 picketed Geske with signs stating: "I.U.O.E. LOCAL 150 ON STRIKE AGAINST GESKE for RECOGNITION AS MAJORITY BARGAINING REPRESENTATIVE OF COMPANY'S OPERATING ENGINEER EMPLOYEES," the words "on strike" being the sign's largest and most prominent language.

During this picketing, the evidence shows that union business agents made direct appeals to Geske's employees, suppliers, and customers. Specifically, Local 150 stopped suppliers and customers and told them that Geske employees were striking when none were. TR. Vol. I at 47; Tr. Vol. V at 233, 235. Moreover, they told Geske customers attempting to enter Geske's driveway that Geske was "closed" and told Geske customers to purchase their supplies from Curran, a union competitor. These customers testified they were told by the union agents that Curran would give them credit and charge them less for asphalt, but Curran actually charged more per ton. TR.

Vol. II at 56, 58-59. The ALJ found Chuck August corroborated these facts. 57a.

Union business agents also testified that they knew the words "on strike" would be understood to mean that concerted action was being taken by employees against their own employer. Tr. Vol. I at 47; Tr. Vol. VIII at 1110-1111.[3] Local 150 combined these misrepresentations with threats to Geske's customers, such as All American Asphalt Maintenance, that they would destroy their trucks, Tr. Vol. II at 153, and lit cigarette lighters to demonstrate their intent. Tr. Vol. II at 153, 157.

Geske filed a state court action on September 5, 1991. It complained that Local 150 untruthfully informed Geske customers that Geske was closed and that Geske's workers were "On Strike." In addition, the complaint alleged that Local 150's publication and use of "on Strike" language on picket signs was materially false and misleading because Local 150 through the reasonable exercise of diligence, acted recklessly in disregard of the truth by representing themselves as Geske employees, making public statements that Geske's employees were on strike, and because none of Geske's employees were in fact on strike or were refusing to work. Geske plead that these acts impaired Geske's operations and caused it damage.

Geske filed a motion for Temporary Restraining Order and for Preliminary Injunctive Relief the same day and successfully obtained a TRO from the Circuit Court of McHenry County. The following day, September 6, 1991, Local 150 filed a Verified Notice of Removal to the United States District Court for the Northern District of Illinois. The district court dismissed the case and remanded it

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[3]Webster's Third New Unabridged Dictionary defines the word "Strike" as: "a work stoppage by a body of workers to enforce compliance with demands made on an employer." Here, no "body of workers" engaged in "a work stoppage" against Geske. *See NLRB v. Illinois Bell Telephone Co.*, 189 F.2d 124 (7th Cir. 1951); *IBEW v. Bradley*, 147 Ill. App. 3d 193, 499 N.E.2d 577 (2d Dist. 1986) ("[w]hen a union prohibits its members from working for their employer--that is a strike."); *City of Rockford v. Local 413*, 240 N.E.2d 705 (Ill. App. 1968) ("cessation of work by employees").

back to state court, finding that Geske's Trade Libel, Tortious Interference with Contractual Relations, and Prospective Economic Advantage counts "are causes of actions available under Illinois common law," 150a, and stated no federal claims. 152a. Local 150 did not appeal this ruling to the Seventh Circuit.

The state trial court received testimony in support of Preliminary Injunctive Relief between September 12 and 27, 1991. After hearing Geske's evidence, the state court found the tort of trade libel was not preempted by federal law under *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58, 65 (1966). It then granted a directed finding to Local 150 for Geske's failure to meet all four equitable standards for injunctive relief, but permitted Geske to amend its complaint. 143a. The Appellate Court of Illinois affirmed both that the torts were not preempted and that Geske had not shown the trial court's decision was a manifest abuse of discretion. 125a, 129a. A petition for writ of certiorari to this Court to apply the "standard of malice or reckless disregard for the truth" rule from *Linn*, 383 U.S. at 58, 65 (1966), and *Lowe Excavating Co. v. International Union of Operating Engrs., Local 150*, 180 Ill. App. 3d 39, 535 N.E.2d 1065 (2d Dist. 1989) ("*Lowe*"), *Ill. app. denied*, 126 Ill. 2d 560, 541 N.E.2d 1107 (1989), *cert. denied*, 110 S. Ct. 499, 107 L.Ed.2d 502 (1989), rather than Illinois' per se evidentiary standard, was denied. *Geske & Sons, Inc. v. Int'l Union of Op. Engrs., Local 150*, 114 S. Ct. 551 (1993).

On September 19, 1991, Local 150 filed a charge alleging that Geske had unlawfully threatened the worker of another employer in seeking to enforce the TRO in violation of Section 8(a)(1) of the Act. Geske was advised by the Region on October 22, 1991, that the matter was being submitted to the Board's Division of Advice. because it raised "novel issues" including "the relatively weak Section 7 right involved when considered in light of *Jean Country*, 291 NLRB 11 (1988). Although not addressed by the Board in *Bill Johnson's* context, the issue of a state court lawsuit seeking to enjoin a right under the Act may be (sic) appropriately involve a balancing

test such as that applied by the Board in property right versus Section 7 right cases."[4]

The Regional Director filed a Complaint against Geske on March 30, 1992, alleging a single violation of Section 8(a)(1) of the Labor Act, in that Geske's causes of action "are without reasonable basis" and motivated by "an intent to retaliate against the protected concerted activity of Operating Engineers Local 150 in seeking to organize the employer's operating engineer employees by engaging in lawful recognitional picketing." ¶ 6(e).

After a two day hearing in December 1992, in which an Administrative Law Judge received the state court transcript of the preliminary injunction proceedings into evidence and took testimony of events not included therein, the ALJ agreed with the two theories of the General Counsel: that the union's charge caused federal preemption to occur under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and that filing of the state lawsuit was "without reasonable basis and were motivated by an intent to retaliate against the protected concerted activity," under *Bill Johnson's Restaurants*. Decision (Feb. 24, 1994) at 115a.[5]

The ALJ also ruled that Geske's suit was baseless because the Illinois Appellate court indicated Geske had little chance of success and second, her independent assessment of the evidence proffered before the State court during the preliminary injunction proceedings, showed only peaceful picketing by agents of Local 150. She

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[4]On March 24, 1992, the union filed another charge with the Regional Director, resulting in the instant litigation, alleging that by exercising its right to seek relief in state court, Geske violated Section 8(a)(1) of the Act, which prohibits interference with employees' right to self-organization.

[5]Geske, the Board, and the Union submitted a nineteen (19) page Stipulation of Facts to the ALJ, as well as joint exhibits representing eleven volumes of transcript and documentary materials developed from the state court preliminary injunction proceeding. This material was marshalled in advance of the hearing in order to avoid the inconvenience and time to reintroduce that testimony.

ordered Geske to reimburse the union and its non-employee union organizers "for all legal expenses incurred...to date and in the future, plus interest" in connection with Geske's lawsuit. 118a.

Between September 1991 and August 1994, the State Court had denied the union's first motion to dismiss Geske's complaint, 145a, and had permitted the filing of a second, third, and fourth amended complaints, the latter for Libel Per Quod, Slander Per Se, and Slander Per Quod. 146a. The state court had ordered all pending dispositive motions for argument on August 11, 1994. On July 19, 1994, the Board filed a Petition for Injunctive Relief under Section 10(j) of the Labor Act, 29 U.S.C. § 160(j), to enjoin Geske's state court lawsuit. 157a. That action resulted in the stay of all state court proceedings to date.

The Board upheld the ALJ's Decision on April 26, 1995, but only to the extent that "the lawsuit was without reasonable basis and was motivated by an intent to retaliate against the Charging Party's protected concerted activity" to engage in recognitional picketing. The Board declined to "pass on whether the suit also violated the Act because it was preempted by Federal law." 31a. It *did* order that Geske reimburse the union for any attorneys' fees it may have incurred. 31a.

Geske petitioned the Seventh Circuit for review of the Board's order under Section 10(f) of the Act, and the Board filed a cross-application for enforcement, under sections 10(e) of the Act. 29 U.S.C. §§ 160 (e) & (f). The Seventh Circuit enforced the Board's order. *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366 (7th Cir. 1997). 1a.

The crucial legal issue is the conclusion made by the Board and the Seventh Circuit that the Board is empowered under *Bill Johnson's Restaurants*, to require the employer to make a full evidentiary presentation of the tort evidence in its possession in an unfair labor practice proceeding and to describe its discovery objectives, plan, and strategy to the Board, in order to be permitted by the Board to continue to pursue the state court lawsuit to a conclusion. The essence of this petition is that the Seventh Circuit ruled in a manner

inconsistent with the statutory design of the Labor Act charted in *Bill Johnson's Restaurants* for preserving the protected First Amendment right of judicial access. This was accomplished by permitting the Board to evaluate all "the plaintiff's evidence," 18a, and permitting it to interpret any state caselaw believed to be controlling, for it to reach the issue whether a material question of fact or law exists in a party's state lawsuit. 17a.

The result of such an accommodation is that this Court's intent for the Board to defer to the state court judiciary in the first instance to protect the right of access by ascertaining the validity of the complaint, is subsumed by language of the Court in *Bill Johnson's Restaurants*, that "in appropriate cases," the Board can order the cessation of a baseless state court lawsuit. *Id.* at 744. The appellate court concluded that the Board's ALJ here did not overstep her bounds by conducting a "virtual trial on the merits" as criticized by this Court in *Bill Johnson's Restaurants*, or usurp the traditional fact finding function of the state judicial system, *id.* at 731, because "in order to carry out its mandate under Bill Johnson's to determine whether a lawsuit is baseless, the Board must examine the plaintiff's evidence to determine whether it raises any material questions of fact." 18a.[6]

Petitioner asks that the Court order the Board to reformulate its analysis in cases when it is asked to consider whether an on-going state court lawsuit may be enjoined. Upon such a relook, the factual record in this case will demonstrate that the Board acted prematurely in determining Geske had committed an unfair labor practice under the Act.

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[6]The Seventh Circuit also noted that its decision granting the attorneys' fees remedy in favor of the union and the non-employee union organizers, placed it in direct disagreement with the Sixth Circuit's decision in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995), that non-employee union organizers are not entitled to the remedy of reimbursement, since they are not employees. 22a n.16.

REASONS FOR GRANTING THE WRIT

I.

PLAINTIFF'S ARE DEPRIVED OF THEIR FIRST AMENDMENT RIGHT OF ACCESS TO THE STATE JUDICIARY WHEN THE BOARD FAILS TO FOLLOW THE PROCEDURE FOR COMITY AND FEDERALISM SET FORTH IN *BILL JOHNSON'S RESTAURANTS V. NLRB* BY DEMANDING A FULL EVIDENTIARY HEARING OF STATE COURT EVIDENCE TO RESOLVE CREDIBILITY QUESTIONS INHERENT TO THE STATE TORTS.

In 1983, this Court fashioned a balancing test to determine when the Board might intervene in a private state court lawsuit by finding the lawsuit to be the commission of an unfair labor practice. *See Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). The Court established, however, that "an employer has the right to seek local judicial protection from tortious conduct during a labor dispute." *Bill Johnson's Restaurants*, 461 U.S. at 742. In *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), the court had held that the state tort of libel was not preempted by the Labor Act.

The Court reaffirmed that "weighty countervailing considerations...militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution." *Bill Johnson's Restaurants*, 461 U.S. at 731. These include "the right of access" to the state courts to seek redress of grievances, the preservation of domestic peace, and the substantial state interest in protecting the health and well-being of its citizens. *Id.* at 742. *Three Affiliated Tribes v. Wold Engineering, P.C.*, 476 U.S. 877, 888 (1986).

Furthermore, the right of access to the courts was recognized to "stand apart" from other forms of action because it is a protected "aspect of the First Amendment right to petition the Government for redress of grievances." 461 U.S. at 741. That right, the Court

explained "is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Id* (emphasis added). Of course, here, Geske has not sought to enjoin any of its employees from exercising any right they may have.

This Court showed that the proper manner for the Board to obtain jurisdiction of the state court case, required it to demonstrate that the state case was both improperly motivated and lacked a reasonable basis in fact or law. It explained the lack of reasonable basis in the First Amendment context to occur "when litigation is based on intentional falsehoods or on knowingly false claims." *Bill Johnson's Restaurants*, 461 U.S. at 743. This is the "sham" exception previously outlined from the Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (197-2). In that case, this Court recognized that the First Amendment guarantee of a right to petition the government for a redress of grievances includes the right of access to the courts: "The right of access to the courts is indeed but one aspect of the right of petition." *Also McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment...."). The Court concluded that "[t]he right to litigate is an important one, and the Board should consider the evidence with utmost care before ordering the cessation of a state-court lawsuit." 461 U.S. at 744.

This balance was not assessed by the Seventh Circuit. 16a. The failure to consider the importance of First Amendment access in the context of whether intentional falsehoods or knowingly frivolous claims are asserted, 461 U.S. at 743, is underscored by the Court's quotation from Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L.Rev. 39, 60 (1980), to support the proposition that the balancing approach taken by this Court under the antitrust laws should be followed under the labor act.[7] Importantly, the *Bill*

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[7]*Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965).

Johnson's Restaurant Court ruled that "[w]e should follow a similar course under the NLRA." 461 U.S. at 744.

The Seventh Circuit observed the Court's considerations listed above "merely as two examples, and not as an exhaustive list of types of" unprotected claims for which direct intervention by the Board could be permitted. 10a n.9. However unclear the Court's language in *Bill Johnson's Restaurants* may have been in identifying "suits based on insubstantial claims" not entitled to protection with Mr. Balmer's observation that "'first amendment interests...are not advanced when the litigation is based on intentional falsehoods or on knowingly false claims,'" 461 U.S. at 731, the Seventh Circuit's position clearly sets itself against this Court's recent explanation in *Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49, 113 S. Ct. 1920 (1993). In *Columbia Pictures*, the Court resolved that the "sham" exception turns on the objective intent of the filer and included *Bill Johnson's Restaurants* in its overview of how the "sham" exception applies in "other contexts." 113 S. Ct. at 1927. That case defined a two-part analysis where "[f]irst, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." If so, then the reviewing court could examine the subjective motivation focused on whether the baseless lawsuit attempts to directly interfere with the opponent's business. *Id.* at. 1928.

The Seventh Circuit's rejection of the "sham" principle also places it in conflict with the decisions of the Ninth Circuit in *USS Posco v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 804 (9th Cir. 1994), stating that this Court in *Bill Johnson's Restaurant* was "applying *Noerr-Pennington* to [the] labor context;" the Third Circuit in *San Filippo v. Bongiovanni*, 30 F.3d 424, 429 (3d Cir. 1994), where "the unprotected status of 'sham litigation;'" was recognized "in construing the NLRA in the present context;" and the Fifth Circuit in *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 325 (5th Cir. 1994), where that Court stated that in *Bill Johnson's Restaurants*, this "Court proceeded to input the sham exception to the *Noerr-Pennington* doctrine into labor law." Unlike the decision in *Geske v. NLRB* here, these three circuits did apply the *Columbia Pictures* "baseless" test, i.e., no

realistic chance of success on the merits, to their individual situations.[8]

Furthermore, "[i]t was not the ALJ's province to make such factual determinations" about the employer's disputed evidence, *id.* at 748. However, the Board with the Seventh Circuit's approval, has now been permitted to engage in a deep factual inquiry in cases of this kind. Despite the *Bill Johnson's Restaurants* seeming prohibition, the record in this case plainly demonstrates that the ALJ and the Seventh Circuit condemned Geske for not presenting all the evidence available to it to establish its state court claims, 7a, 17a, 113a. Although there is no dispute that a substantial amount of evidence had been submitted to the Board, from which an initial determination whether genuine facts or law were present could be made, the test was abandoned. However, apart from the Stipulation of Facts to the ALJ and the testimony of Geske's general manager Lori Geske, co-owner Larry Geske and employee Ron Coss, the Seventh Circuit concluded that "[w]hen Geske elected not to produce any other evidence in support of its case, the Board correctly ruled, based on the evidence before it, that Geske's suit was baseless." 18a (emphasis added).

In *Bill Johnson's Restaurants*, 461 U.S. at 748, the Court stated that the ALJ erred when:

> he had no reservations about weighing the evidence and making credibility judgments. Based on his own evaluation of the evidence, he concluded that the libel count in petitioner's suit lacked merit, because the statements in the leaflet were true, and that the business interference counts were groundless, because the evidence failed to support petitioner's allegations....It was not the ALJ's province to make such factual determinations....he should have limited

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[8] *Also Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1407 (10th Cir. 1992), identified the "baseless test" in *Bill Johnson's Restaurants* to exist where "controlling federal law bars the plaintiff's right to relief, ... clear state law makes the case frivolous, or ... no reasonable jury could [find] in favor of the plaintiff." 461 U.S. at 754-55 (Brennan, J., concurring).

his inquiry to the question whether petitioner's evidence raised factual issues that were genuine and material.

Hence, in *Bill Johnson's Restaurants*, the Board erred by permitting its ALJ to conduct "a virtual trial on the merits," to observe demeanor and resolve the credibility of witnesses. 461 U.S. at 744-45, 748. "[I]f there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot in our view, be concluded that the suit should be enjoined." *Id.* at 745 (emphasis added). The same applies if there is any material question of state law present. *Id.* at 747.[9]

In the instant case, the appendix herein (24a-121a) shows that the ALJ wrote an extensive decision where she reviewed all the evidence and made numerous credibility and demeanor based decisions in favor of one party over another.[10] Moreover, neither the ALJ at the hearing nor the Board in its Decision articulated any "test" it was employing or would employ for determining baselessness.

The Seventh Circuit observed that the respondent's duty at the hearing is similar to a party's burden in a summary judgment proceeding under Rule 56 of the Federal Rules of Civil Procedure. 18a. However, in *Bill Johnson's Restaurants*, this Court concluded that the state court's determination on summary judgment "should

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[9]Geske's libel case was found not preempted, 151a, or to seek an illegal objective. *See Bill Johnson's Restaurants*, 461 U.S. at 737 n.5. *Local 30, United Slate, Tile & Corp. Roofers v. NLRB*, 1 F.3d 1419, 26 (3d Cir. 1993); *Emery Worldwide v. NLRB*, 966 F.2d 1003, 1006 n.4 (5th Cir. 1992).

[10]The ALJ made the following testimonial resolutions based on credibility and "demeanor of the witnesses who testified before me," 35a: Larry Geske and employee Ron Coss over organizer Chuck August at 44a; employee Ron Coss over Laborer's Union Local 1035 Secretary/Treasurer Gerald Bauman at 76a, 77a; Chuck August over Lori Geske at 52a n.18; Chuck August's "live" testimony over employee Leroy Geske, Jr.'s ("Tigger") transcript testimony at 61a n.21; Chuck August over Lori Geske at 62a n.23; and Chuck August over Lori Geske at 66a n.28.

be given careful consideration" by the Board, 461 U.S. at 733 n. 15, to ensure that the state court parties participate fully in the state's judicial proceeding to enable them to act accordingly. The Seventh Circuit's order to duplicate the state summary judgment procedure before the Board, is not a simple request; summary judgment is a weighty undertaking based on the entire record after discovery.[11]

The Seventh Circuit stated the Board requires additional review authority beyond the *Bill Johnson's Restaurants* delineated standard, because 1) the Board must be able to examine the evidence to determine if material questions of fact are raised, 18a, and 2) to ensure the Board's "authority to deal with" unfair labor practices is not impeded by the state court discovery process, 18a. That delegation of authority to the Board is not founded upon the limiting language in *Bill Johnson's Restaurants*. This Court explained that "the Board must refrain from deciding genuinely disputed factual issues with respect to a state suit," 461 U.S. at 746, which include "the credibility issue," "proper inferences to be drawn from undisputed facts," or even for it to "disbelieve [the plaintiff's] story." 461 U.S. at 746 n. 12. Rather, if material facts are raised, the Board must determine if "plaintiff's theory *might be adopted*." *Id.* at 746-47 (emphasis added).[12]

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[11]Premature interference is demonstrated where "material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined....Hence, we conclude that if a state plaintiff is able to present the Board with evidence that shows his lawsuit raises genuine issues of material fact, the Board should proceed no further with the §8(a)(1)-§9(a)(4) unfair labor practice proceedings but should stay those proceedings until the state-court suit has been concluded," 461 U.S. at 745, 746. In fact, the Court was concerned that the Board would "resolve the credibility issue and perhaps disbelieve Doe's story and enjoin the lawsuit for lack of a reasonable basis, thereby effectively depriving Doe of his right to have this factual dispute resolved by a state-court jury." 461 U.S. at 746 n.12.

[12]Even in cases involving mixed questions of fact and law, the Court ordered that the Board "must not deprive a litigant of his right to have genuine state law legal questions decided by the state judiciary." *Id.* at 746. This deference extends "if there is *any realistic chance* that the plaintiff's legal theory

(continued...)

The appellate court stated that to "carry out its mandate under *Bill Johnson's*...the Board must examine the plaintiff's evidence" or otherwise the Board would be unable to prevent the lawsuit from being a tool of coercion. 18a. That reasoning directly conflicts with the Court's fundamental conclusion that the use of a lawsuit for coercive purposes is proper so long as the lawsuit is not baseless. In the circumstances here, the authority to examine evidence to ferret out the presence of coercion furthers no purpose in the Board's review process at this stage and serves only to undermine the Court's attempt to abbreviate the Board's process in these cases to preserve the right of access. As the Third Circuit has observed in *Chauffeur, Teamsters, Local 776 v. NLRB*, 973 F.2d 230, 235 (3d Cir. 1992), the right of access to the courts is a "more significant consideration" than the potential that a lawsuit may be a powerful instrument of coercion. The Seventh Circuit's analysis unwinds the Court's *Bill Johnson's Restaurants* national standard and the interest of federalism it had ensured.

This structure is also consistent with *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62 (3d Cir. 1992). There, the Third Circuit held the Board to the *Bill Johnson's Restaurants* requirement to identify disputed issues of fact or law and rejected the Board's automatic finding of lack of reasonable basis from an unsuccessful verdict (a settlement) in favor of the employer: "We think the better reading, however, requires the Board to find that the withdrawn suit lacked a reasonable basis in fact or law." *See Summitville Tiles, Inc.*, 300 N.L.R.B. 64, 65 (1990) (Board previously recognized "both essential prerequisites to enjoin prosecution of a state court lawsuit"; company conceded retaliatory motive).[13]

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[12](...continued)
might be adopted" unless the theory "is plainly foreclosed as a matter of law or is otherwise frivolous." *Id.* at 747. These two factors have been accepted in other circuits without revision, *e.g.*, *Chauffeurs, Teamsters, Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992).

[13]In supporting the Board's version of the law, the Seventh Circuit failed to assess Geske's version, such as *Magill Bros., Inc. v. Building Serv.*
(continued...)

In neither situation addressed by the Seventh Circuit, is there any consideration of the fact that Geske would be completely deprived of a forum to pursue a remedy for an actual injury if its case is dismissed or to accommodate the "federalism concerns" that are at stake. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).[14]

Discrete errors of judgment are implicit in premature Board jurisdiction. Indicated by the Board review and appellate oversight demonstrated in this case, two erroneous observations made by the Seventh Circuit are highlighted. First, the Seventh Circuit admitted it examined Geske's second amended complaint: "(the version under which the Board ultimately granted relief to Local 150)," 6a, although knowing that "Geske has amended its state lawsuit four times, 3a n.1, and confidently stating Geske's case would be different if it had pled counts of "libel per quod" instead. However, the Board's Decision is based on Geske's "third amended complaint," 118a, of which an entire section of the ALJ's opinion is devoted. 79a-82a. And, well prior to the filing of the ALJ's decision, Geske was authorized by the state trial judge on Dec. 7, 1993, 146a, to file its Fourth Amended Complaint for libel per quod, slander per se, and slander pre quod, on the basis of *Kuwik v. Starmark Star Marketing and Admin., Inc.*, 156 Ill. 2d 16, 619

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[13](...continued)
Employees' Int'l Union, 127 P.2d 542 (1942), where the union attempted to organize the employer's workers without an election. When the employer refused to sign a contract based upon the union's demand for recognition, the union began picketing with signs stating: "This house on strike. A.F.L." The Supreme Court of California held that "[t]here can be no doubt that untruthful picketing is unlawful picketing." *Id.* It further found that, "it is the nearly unanimous rule throughout the country that equity will intervene where false or fraudulent statements are combined with picketing and where, under local policy, this renders the picketing illegal." 127 P.2d at 544. Thus, the *Magill* Court held that "[t]he right to restrain the use of false or untruthful statement made in connection with picketing does not restrict the right to picket peacefully and honestly." 127 P.2d at 545.

[14]Geske had pled the affirmative defense that the Board's action against it interfered "with the judicial processes of a state court and the First Amendment rights of employers and other persons in seeking redress of grievances arising under state law." Respondent's NLRB Ex. 1.

N.E.2d 129 (July 22, 1993), where the Illinois Supreme Court established the proper libel standard to apply in Illinois was the "approach taken by the Restatement (Second) of Torts...."[15]

Nowhere in the ALJ or Board decisions are there any references to this Court's regimen and standards set forth in ***Bill Johnson's***

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[15]The Seventh Circuit contends that *Kuwik* does not establish the proper libel standard in Illinois. 12a n.11. Since the state trial court granted the motion to amend the complaint on the basis of *Kuwik*, the Seventh Circuit's observation is speculative. The Seventh Circuit had the entire record of the state trial court before it. On September 21, 1995, the court granted Geske's motion to take "Judicial Notice of Related Judicial Proceedings" in both the state court and in the companion case of *Zipp v. Geske*, 154a, 163a, in which all the state court proceedings between the union and Geske, including the Fourth Amended Complaint and docket sheet, were introduced.

Where the Seventh Circuit proceeded to decide the merits of Geske's case based on its interpretation of appellate review, 17a, it rejected Geske's position that in Illinois, "[i]n ruling on a motion for preliminary injunctive relief, however, controverted facts on the merits of the case are not decided." *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 156 601 N.E.2d 720, 727 (1992). *See LSBZ, Inc. v. Brokis*, 237 Ill. App.3d 415, 424, 603 N.E.2d 1240 (2d Dist. 1992) ("[t]he purpose of a preliminary injunction is not to determine controverted facts or the merits of the case."). Rather, the "purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits of a cause." *Hartlein*, 152 Ill.2d at 142. On review, the appellate court "may decide only whether the petitioner has demonstrated a prima facie case that there is a fair question as to the existence of the rights claimed." *Id.*

Second, Geske's interlocutory appeal to the state appellate court on October 15, 1991, was presented under Illinois Sup. Ct. Rule 307(a)(1) for "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction," and not from a "Final Judgment" under Ill. Sup. Ct. Rule 304(a). In Illinois, a trial court's failure to issue a preliminary injunction is not "tantamount to a final judgment" and "overlooks the limited scope of review on a Rule 307(a)(1) appeal....The rule *may not be used as a vehicle to determine the merits* of a plaintiff's case," and the Supreme Court of Illinois will not "allow [the plaintiff] to treat this appeal as if it had been brought pursuant to Rule 304(a)," *Postma v. Jack Brown Buick*, 157 Ill.2d 391, 398-99, 626 N.E.2d 199, 203 (1993) (emphasis added). *See* 113a (ALJ notes the "manifest weight of the evidence" standard). In *North Pole Corp. v. Village of East Dundee*, 263 Ill. App.3d 327, 635 N.E.2d 1060 (2d Dist. 1994), the court explained that under Illinois law at the preliminary injunction hearing, the "plaintiff was not required to meet the same burden of proof that will be required for it to prevail on the ultimate issue." *Id.* at 334, 635 N.E.2d at 1065.

Restaurants. Omission and neglect of *Bill Johnson's Restaurants* has become the de facto standard in Board review of cases of this kind.[16]

The Court's guidance to the Board in these matters can simply not be ignored further under any of the possible scenarios that the Board or the Seventh Circuit has offered. Their pronouncements run headlong against that guidance: "It has therefore repeatedly been held that an employer has the right to seek local judicial protection from tortious conduct during a labor dispute." *Bill Johnson's Restaurants*, 461 U.S. at 742. Further federal intrusion into state judiciary proceedings presents a grave constitutional risk to a disciplined system of federalism.

II.

A CIRCUIT CONFLICT NOW EXISTS IN THE BOARD'S REMEDIAL POWER TO AWARD ATTORNEYS' FEES AND COSTS TO A NON-CERTIFIED UNION AND TO NON-EMPLOYEE UNION ORGANIZERS FOR OTHER THAN FRIVOLOUS, PREEMPTED OR ILLEGAL LAWSUITS.

The Seventh Circuit has endorsed the Labor Board's exercise of authority to award costs and attorneys' fees to uncertified unions and non-employee union organizers. The court explained that the decision in *Bill Johnson's Restaurants* did not "draw such a categorical reference by negative implication" between employees and non-employees, and Board orders in other cases have permitted awards in favor of unions, citing *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385 (D.C. Cir. 1995), and *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085 (9th Cir. 1995). 21a.

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[16]The Board has occasionally acknowledged the existence of the right to petition the government for redress of grievances in cases such as *Johnson & Hardin Co.*, 305 N.L.R.B. 690, 691 (1991), but as an agency without expertise to adjudicate state law, it repeatedly fails to apply state law and the constitutional right to petition, correctly. *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995) (enforcement denied).

The Seventh Circuit admits that the Board's order of reimbursement was not "squarely placed before" the *Diamond Walnut* court, 22a n. 16, but believes that protection from baseless and retaliatory lawsuits broadly "impacts on the statutory protections afforded employees under the Act," and so should be remediable to stranger unions. *Id.* It also recognizes that the Sixth Circuit in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995), refused to enforce an attorneys' fee award in favor of non-employee union organizers and their uncertified union, but observes the Sixth Circuit's ruling was "brief" and the "Board had not adequately justified the award of fees to the non-employee union members." *Id.* Finally, the Seventh Circuit asserted that *Johnson & Hardin* was not in conflict with *Gibson Greeting*. *Id.* The Seventh Circuit's evaluation underscores the move to unrestrained Board power.

In *Diamond Walnut* the employer had sued a union that represented its striking employees along with another union that actually issued an allegedly defamatory letter. 53 F.3d at 1089. In *Gibson Greeting*, the Court denied a certified union's cross-petition alleging that the Board had erred by failing to award it attorneys' fees and costs under its winning § 8(a)(5) charge, for expenses incurred where the employer did not prevail in a section 301, 29 U.S.C. § 185, lawsuit filed for breach of the collective bargaining agreement. In *Gibson Greeting*, the Board did not consider "whether the employer's claims were made in bad faith." 53 F.3d at 394. The Seventh Circuit's expansive ruling is not supported by these two cases.

The traditional test for an attorneys' fee award under Board law was set forth in *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), *enf'd mod. International Union of Electrical Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 921 (1974). In *Tiidee Products*, a company was ordered to pay litigation costs associated with the NLRB proceeding due to the company's "clear and flagrant violation of the law" to discourage "future frivolous litigation." *Id. See also Lang Towing, Inc.*, 201 N.L.R.B. No. 92 (1973) (setting forth a "frivolous" defense standard); *Heck's, Inc.*, 215 N.L.R.B. No. 142 (1974) (affirming frivolous defense standard).

In post-*Tiidee Products* cases, the courts have not agreed with the Board's standards. In *Bill Johnson's Restaurants*, 461 U.S. at 747 (emphasis added), this Court set forth the following attorney fees standard:

> The employer's [civil] suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employee's Section 7 rights. If a violation is found, the Board may order the employer to reimburse the employees for whom he had wrongfully sued for their attorneys' fees and other expenses.

Thus, the Court based its civil lawsuit/attorney's fee grant of authority on an anticipated finding of "employer retaliation" against its own employees, including but not limited to whether the civil suit had merit. The Court concluded "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA." 461 U.S. at 744 (emphasis added).

Notably, in *Bill Johnson's Restaurants*, the employer sued not only the union, but eight of its own employees. It obtained an initial TRO that was later dissolved. Its "business claims" were dismissed, but its libel claims sustained summary judgment. 461 U.S. at 734. Similarly, Geske's libel allegations are not "beyond the jurisdiction of the state courts" (since Geske initially obtained a TRO). Neither does the case present "an objective that is illegal under federal law." *Id.* at 731 n.5.[17]

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[17]The key ingredient was the defendant employees' status. This theme is repeated throughout the Court's opinion: "Since 1978, the Board has consistently adhered to the *Power Systems*[, 239 N.L.R.B. 445 (1978), *enf. denied*, 601 F.2d 936 (7th Cir. 1979),] rule that an employer or union who sues an *employee* for retaliatory motive is guilty of a violation of the Act," *id* at 739; "by suing an *employee* who files charges with the Board...the employer can place its employees on notice," *id.* at 740, and "[w]here, as here, such a suit is filed against hourly-wage waitresses or other *individuals who lack the backing*

(continued...)

In ordering Geske to pay the union's fees and costs here, the ALJ/Board ruled that the order is appropriate "even though the lawsuit included certain causes of action which were not preempted and which might have constituted a reasonable basis for a damage suit before the Federal district court under Section 303 of the Act," 116a-117a.

The Board's action does not follow the Board's own cases, *BB&L, Inc. v. NLRB*, 52 F.3d 366 (D.C. Cir. 1995) (Board cannot ignore its own relevant precedent), and the remedy imposes "a substantial deterrent to commencing litigation," protected from indirect impairment by the First Amendment. *Workers Compensation Fund v. Lennes*, 46 F.3d 813, 822 (8th Cir. 1995) (statute that burdens legal challenges unconstitutional).

The Seventh Circuit found these distinctions incorrect, interpreting the Bill Johnson's Restaurant decision as one where the Court "simply addressed the case before it." 19a-20a. The Seventh Circuit was concerned an anomaly in the caselaw would occur if an employer could sue a union to interfere with employee rights, but not its own employees attempting to organize, 20a. While the Seventh Circuit properly recognizes that, "[i]t is true that 'by its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers.'" *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532, 117 L. Ed. 2d 79, 112 S. Ct. 841 (1992)" 19a, it cannot and does not explain the "anomaly" its decision now imposes on the caselaw in favor of non-employees, if non-employee union organizers are provided no derivative remedy against lawsuits to remove them from private property, because "§ 7 simply does not protect nonemployee union organizers," *Lechmere*, 502 U.S. at 537.

Under *Tiidee Products*, Geske's defense of the single charge and its filing of defamation counts in state court cannot be deemed "frivolous," in "clear flagrant violation of the law," *id.*, pre-empted or an illegal act. *Local 32B-32J, Service Employees Int'l Union*, 68

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[17](...continued)
of a union, the need to allow the Board to intervene and provide a remedy is at its greatest," *id.* at 741.

F.3d 490, 496 (D.C. Cir. 1995) (interpreting *Bill Johnson's Restaurants* as allowing the board to award fees "if the litigation was unlawful").

The Board has not ruled that Geske's lawsuit was patently frivolous or its defenses not debatable, two requirements this Court adopted when considering a Board reimbursement remedy case utilizing *Tiidee Products*. *NLRB v. Food Store Empl., Local 347*, 417 U.S. 1, 9-10 & n.9 (1974). In *Tiidee*, the remedy there would have been "extraordinary," while here, it appears to have become simply part of a "conventional make-whole remedy."[18]

On remand from *Food Store Empl., Local 347*, the Board clarified its policy and made it clear that costs and fees are limited to cases where "patently frivolous defenses" are asserted and are not recoverable where the defenses "are debatable," which includes situations that are "dependent on resolutions of credibility." *Heck's, Inc.*, 215 N.L.R.B. No. 142 (1974). This remains the Board's unwavering standard to date. *Unbelievable, Inc.*, 318 N.L.R.B. 857, 860-61 (1995).

These standards derived from *Tiidee Products* have been uniformly applied in sustaining fee awards "only where the defenses asserted by the employer...are totally without merit or frivolous." *East Bay Chevrolet v. NLRB*, 659 F.2d 1006, 1011 (9th Cir. 1981); *J.P. Stevens & Co. v. NLRB*, 612 F.2d 881, 883 (4th Cir. 1980) ("only for frivolous or dilatory conduct"); *Dist. 65, Distributive Workers v. NLRB*, 683 F.2d 1155, 1167 (D.C. Cir. 1978) (affirming the *Heck's* frivolous standard); *United Steelworkers of Amer. v. NLRB*, 496 F.2d 1342, 1352-53 (5th Cir. 1974) (make whole remedy not available where "factually debatable questions," exist, the conduct was not for delay of collective bargaining, or frivolous); *Federal Prescription Service, Inc. v. NLRB*, 496 F.2d 813, 819 (8th Cir. 1974) (frivolous). The case at bar represents a dramatic departure from this standard without explanation.

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[18]In *Shepard v. NLRB*, 459 U.S. 344, 350 (1983), a wrongful dues cases, the Court affirmed the Board's order that the reimbursement remedy is to be "reserved for especially egregious cases."

Moreover, in *Montgomery Ward Co.*, 288 N.L.R.B. 126, 195 (1988), the Board had upheld an ALJ recommendation not to award attorneys' fees as a remedy to a stranger union that was not the employee bargaining representative:

> In the instant case, it cannot be said that the Respondent's actions toward Johnson (the non-employee), although found to be unlawful, were frivolous or without some debatable support in the invalid no-solicitation rule. Additionally, the cases where the Board has awarded litigation expenses for civil or criminal court proceedings resulting from an employer's unlawful conduct, such awards have been uniformly given to employees. None of the cases involve non-employee union representatives. [citations omitted]. In light of the above I find no compelling basis for extending recovery of legal expenses for the criminal action or to direct the Respondent to request expurgation of the court's records on behalf of non-employee Johnson. (Emphasis added).

As evidenced by *Montgomery Ward's* express language, the Board's remedial powers will not be applied to award attorneys' fees in cases involving non-employee actions filed with "debatable support." *Id.* In its foray into extending rights to non-employees, the Board erred in failing to explain why *Montgomery Ward* is no longer dispositive in the instant case, although raised as Amended Revised Exception 84 by Geske, or the *Tiidee Products/Heck's* standard that fees are not awardable where credibility determinations are needed to resolve the facts. *See Unbelievable, Inc.*, 318 N.L.R.B. at 860.

Finally, the Sixth Circuit in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995), plainly refused to enforce an attorney's fee award in favor of non-employee union organizers. Relying upon this Court's decision in *Bill Johnson's Restaurants*, *Tiidee Products*, and *Int'l Union of Electrical Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), the Sixth Circuit ruled that the Board erred by not distinguishing between employees and non-employees as beneficiaries of the Act, especially where the "harsh remedy of a

grant of attorneys' fees" did not occur in the context of a flagrant violation of the Act. *See* Geske's Amended Revised Exception 84.

A straightforward case to resolve these nationally important procedural and substantive matters is necessary. The prospect of abrupt interference imposed by a medley of federal authorities against the proceedings of a sovereign state's judicial system in future cases cannot be ignored. The Seventh Circuits's decision promotes this fundamental conflict in the power the Board will now exercise in future cases. That power contrasts with the Board's authority in every other circuit court of appeal. This conflict requires the Court's resolution. The Court should resolve these important and recurring issues in the Board's jurisdiction.

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: April 30, 1997

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 95-2213 & 95-2358

GESKE & SONS, INC.,

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Intervenor.

On Petition for Review and Cross-Application
for Enforcement of an Order
of the National Labor Relations Board
No. 33-CA-9557-2

ARGUED FEBRUARY 5, 1996—DECIDED JANUARY 9, 1997

Before BAUER, RIPPLE and MANION, *Circuit Judges.*

RIPPLE, *Circuit Judge.* This dispute between Geske and Sons, Inc. ("Geske" or "the Company") and Local 150 of the International Union of Operating Engineers, AFL-CIO ("Local 150" or "the Union") has spawned litigation before the Illinois state courts, the National Labor Relations Board and the federal district court. In this case and a companion case, *Zipp v. Geske & Sons, Inc.*, 103 F.3d

1379, 1997 U.S. App. LEXIS 378, No. 95-3272 (7th Cir. Jan. 9, 1997), issued at the same time as this case, we resolve this dispute.

In the present case, the National Labor Relations Board ("NLRB" or "Board") determined that Geske had violated the National Labor Relations Act ("NLRA" or "Act") by filing and prosecuting a baseless lawsuit in state court against Local 150. The NLRB therefore ordered Geske to dismiss that suit and to reimburse the defendants for their expenses incurred in defending against the suit. Geske now challenges the Board's order and asks us to deny enforcement; the NLRB asks that we grant enforcement of their order. Because the Board correctly exercised its authority under the NLRA by ordering Geske to dismiss its state lawsuit, we grant enforcement of its order.

I

BACKGROUND

A. *Local 150 Pickets Geske for Recognition*

Geske manufactures asphalt; it is the only nonunionized asphalt manufacturer in the Chicago area. Local 150 is a union that represents operators in the construction industry.

From August 19 to September 18, 1991, Local 150--assisted on occasion by members or representatives of other unions--picketed Geske. It sought recognition as the union representing Geske's operator employees. Local 150 did not file a petition for an election for recognition as the employees' representative union. Section 8(b)(7)(C) of the Act, 29 U.S.C. § 158(b)(7)(C), implicitly permits recognitional pickets for "a reasonable period of time not to exceed thirty days" even in situations in which a union has not filed a petition for an election. *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 338, 54 L. Ed. 2d 586, 98 S. Ct. 651 (1978); *Kobell v. United Food & Commercial Workers Int'l Union, Local 23*, 788 F.2d 189, 194 (3d Cir. 1986).

During the picketing, Local 150 displayed signs reading:

I.U.O.E. LOCAL 150
ON STRIKE
AGAINST
GESKE
FOR RECOGNITION AS MAJORITY BARGAINING
REPRESENTATIVE
OF COMPANY'S OPERATING ENGINEER EMPLOYEES

During the course of the picketing, the Union told customers approaching Geske's plant that the Company was "on strike," that Geske was "closed" or "broken down," that the operators at Geske's plant wanted to be unionized, and that the customers could buy asphalt at a lower cost from one of Geske's unionized competitors. At times, Local 150 parked near Geske's plant an automobile with license plates that read "SCABBY." The vehicle also had a large inflatable rat on the roof, and bore signs on the sides that read "Local 150 Rat Patrol."

B. *Geske's Lawsuit in State Court*

On September 5, 1991, Geske filed a lawsuit in Illinois state court against Local 150 and various other defendants.[1] The suit raised three causes of action: trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage. Geske's trade libel claim alleged that the "on strike" language on the Union's picket signs, in conjunction with similar oral statements made by the picketers to Geske's suppliers and customers, was false and misleading. The other two causes of action related to the Union's attempts to dissuade Geske's suppliers and customers from doing business with Geske.

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[1]Geske has amended its state lawsuit four times, variously adding and dismissing numerous defendants. The record does not indicate clearly the identity of the remaining defendants. This ambiguity, however, has no bearing on our resolution of this case.

In its suit, Geske requested injunctive relief and damages. After an *ex parte* hearing on September 5, the day the suit was filed, the Illinois court issued a temporary restraining order that prohibited the Union from blocking the entrance to Geske's plant, from threatening Geske's employees, customers or suppliers, and from publishing false and misleading statements about Geske.

On September 6, the Union removed Geske's suit to federal court. On September 11, however, the district court remanded the case to state court. It held that Geske's three claims were all brought under state common law and that none was preempted by the NLRA. Accordingly, the court concluded, there was no basis for federal jurisdiction.

On September 12, the Illinois trial court began a nine-day hearing on Geske's request for a preliminary injunction. After Geske presented its case-in-chief, the court granted the defendants' motion for a directed finding.[2] The court held that, under the applicable definition of trade libel in Illinois, there was no "reasonable extension" or "reasonable interpretation" of Local 150's "on strike" statements that could be construed as trade libel; the court thus concluded that Geske had a very small likelihood of success on the merits with respect to its libel claim.

The Illinois court further held that Geske had failed to produce any evidence that it suffered tortious interference in the conduct of its business. The court ruled that, although there was evidence that the picketers did interfere to a limited degree with Geske's business and contractual relationships, the evidence indicated that the interference was merely incidental to lawful acts by the Union, and hence, was not tortious. The court therefore concluded that Geske had little likelihood of success on the merits of either of these two

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[2]The Illinois Code provides for a motion in a non-jury case to find for the defendant at the close of the plaintiff's evidence. The Code states, in relevant part, "In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. . . . If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered." 735 Ill. Comp. Stat. 5/2-1110 (West 1996).

remaining claims. Accordingly, the court denied Geske's motion for a preliminary injunction.

Geske then filed an interlocutory appeal of the denial of its motion for a preliminary injunction. The Illinois trial court stayed all further proceedings pending the resolution of Geske's appeal. The Illinois appellate court denied Geske's appeal on September 29, 1992.[3] Geske then filed a petition for leave to appeal to the Supreme Court of Illinois and a petition for a writ of certiorari to the Supreme Court of the United States. Both petitions were denied.[4]

Despite having lost its motion for a preliminary injunction, Geske then sought to continue to prosecute its lawsuit on the merits in state court. The NLRB petitioned the federal district court for an injunction, pursuant to 28 U.S.C. § 160(j), to prohibit Geske from prosecuting its case in state court until the proceedings before the Board were resolved. Geske, in turn, countersued the NLRB. That petition and countersuit are the subject of *Zipp v. Geske*. Geske's state lawsuit has remained stayed pending the resolution of that litigation.

C. *Proceedings Before the National Labor Relations Board*

Local 150 responded to Geske's state lawsuit by filing an unfair labor practice charge with the NLRB on September 19, 1991.[5] On

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[3]*Geske & Sons v. International Union Local 150*, 211 Ill. Dec. 428, 655 N.E.2d 331 (Ill. App. Ct. 1992) (unpublished order).

[4]*Geske & Sons, Inc. v. International Union of Operating Eng'rs, Local 150*, 151 Ill. 2d 563, 616 N.E.2d 333, 186 Ill. Dec. 380 (Ill. 1993); *Geske & Sons, Inc. v. International Union of Operating Eng'rs, Local 150*, 510 U.S. 992, 126 L. Ed. 2d 452, 114 S. Ct. 551 (1993).

[5]The union previously had filed an unfair labor practice charge with the Board on September 9, but it ultimately dropped that charge. The union filed two unfair labor practice charges--Charge Nos. 33- CA-9557-1 and 33-CA-9557-2--on September 19. The union subsequently dropped the first of these charges. It is only the second charge filed on September 19, Charge No. 33-CA-9557-2, with which

(continued...)

March 30, the Board's Regional Director, on behalf of the Board's General Counsel, issued an unfair labor practice complaint against Geske, alleging that Geske's filing, maintenance and prosecution of its state lawsuit against Local 150 violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1),[6] because the suit lacked a reasonable basis and was motivated by Geske's retaliatory intent.[7] The second amended version of that complaint (the version under which the Board ultimately granted relief to Local 150) sought an order that prohibited Geske from further pursuing its state lawsuit and required

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[5](...continued)
we are concerned in this appeal. On March 24, 1992, Local 150 amended Charge No. 33-CA-9557-2.

Geske submits that the Board, rather than Local 150, actually filed the amended charge on March 24. According to Geske, under 29 U.S.C. § 160(b), the Board may not solicit or initiate a charge, and so the March 24 charge against Geske should have been dismissed as improperly filed. This contention is devoid of merit. The record clearly indicates that Dale Pierson, an attorney for Local 150, signed under penalty of perjury and filed Charge No. 33-CA-9557-2 on September 19, and that he signed and filed the amended charge on March 24. Moreover, in its "Stipulation of Facts and Tables Indexing Joint Exhibits" filed with the NLRB, Geske stipulated that "On March 24, 1992, Local 150 filed its first amended charge in Case 33-CA-9557-2." Having stipulated to this fact before the Board, Geske may not now contend on appeal that it was the Board that actually filed the first amended charge.

[6]Section 8(a)(1), 29 U.S.C. § 158(a)(1), insofar as it is relevant to this case, provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights [to self-organize or to join labor organizations]."

[7]At the same time, the Regional Director sent letters to the Illinois trial and appellate courts, informing them that it had filed a complaint against Geske based on the company's state lawsuit, and that Geske therefore could not pursue the lawsuit until the NLRB had resolved the complaint. By this time, the parties had already filed briefs in the Illinois appellate court in Geske's interlocutory appeal from the trial court's denial of its motion for a preliminary injunction. The Illinois appellate court solicited position statements from the parties on the propriety of staying its proceedings. The appellate court initially stayed the proceedings, but then lifted the stay to allow oral arguments. As noted previously, the appellate court denied Geske's appeal, and the Illinois Supreme Court and United States Supreme Court denied Geske's petitions for leave to appeal and for a writ of certiorari, respectively.

Geske to reimburse the defendants in that lawsuit for the attorneys' fees and expenses they had incurred defending against that suit. Geske filed its answer to the complaint on May 28.

On December 3 and 4, 1992, an administrative law judge ("ALJ") conducted a hearing on the Board's complaint against Geske. At the hearing, Geske's counsel maintained that, despite having been denied its motion for a preliminary injunction, Geske nonetheless could prevail at trial in state court on the merits of its lawsuit because it had "lots of other evidence" in addition to that which it presented in the preliminary injunction hearing. Geske refused, however, to present this additional evidence to the ALJ.

On February 24, 1994, the ALJ issued her decision. She held that Geske violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by filing, maintaining and prosecuting a baseless state court lawsuit for retaliatory reasons. In holding that the state lawsuit was baseless, the ALJ stated that she:

> relied mostly on the determination of the state judge who conducted the [preliminary injunction hearing] that Geske had failed to establish [a] likelihood of success on the merits, and on the action of the state appellate and supreme courts in denying Geske's interlocutory appeal. . . . No reason to discount the state courts' conclusions [was] suggested . . . by [her] review of the state court transcript of testimony and the various briefs and other documents which are part of the state court record and the record [in the administrative hearing].

Geske then filed exceptions to the ALJ's rulings. After considering Geske's exceptions and briefs from the parties, the NLRB, acting through a three-member panel, agreed with the ALJ that Geske had violated the NLRA by filing and prosecuting its state lawsuit against Local 150 and the other defendants. The Board agreed that the lawsuit lacked a reasonable basis and that Geske filed it with retaliatory intent. Geske then petitioned this court for review of the Board's order, and the Board cross-petitioned for enforcement

of its order. Finally, Local 150 moved for and was granted permission to intervene.

II

DISCUSSION

A. *The NLRB's Injunction of Geske's State Lawsuit*

Geske's primary claim on appeal is that the Board exceeded its authority under the NLRA and violated Geske's First Amendment right to petition the courts for redress of grievances when it enjoined Geske from prosecuting its lawsuit in state court.[8] We analyze this claim under the standards set forth in *Bill Johnson's Restaurants,*

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[8]Geske claims on appeal that Local 150's March 24 charge, upon which the General Counsel issued its complaint in this case, was filed outside the six-month statute of limitations established by section 10(b) of the Act, 29 U.S.C. § 160(b). Geske submits that the March 24, 1992 charge challenges its September 5, 1991 filing of its state lawsuit, and that Local 150 therefore filed the charge more than six months after the allegedly unfair labor practice. Geske further submits that, notwithstanding the "First Amended" caption on the March 24 charge, that charge did not challenge the same act or occurrence as the September 19 charge, and thus the March 24 charge did not relate back to the date of the original filing. The ALJ, whose determination was adopted by the Board, concluded that this objection was untimely and, in any event, meritless.

We shall not consider Geske's statute of limitations defense. The six-month statute of limitations in section 10(b) is an affirmative defense, rather than a jurisdictional limitation. *NLRB v. Wizard Method, Inc.*, 897 F.2d 1233, 1236 (2d Cir. 1990). Geske waived that defense by failing to raise it either in its answer to the General Counsel's complaint or at the administrative hearing before the ALJ. Id. Thus, Geske may not now raise this defense in this petition for review. In its Reply Brief, Geske cites *Davis Supermarkets, Inc. v. NLRB*, 303 U.S. App. D.C. 193, 2 F.3d 1162 (D.C. Cir. 1993), *cert. denied*, 128 L. Ed. 2d 45, 114 S. Ct. 1368 (1994), in support of its claim that it has not waived its statute of limitations defense. *Davis Supermarkets* is inapposite, however. That case dealt only with the question whether the petitioner had preserved a claim for appellate review under 29 U.S.C. § 160(e) by adequately excepting to the ALJ's findings before the Board. 144 L.R.R.M. 2057, 2 F.3d 1162 at 1174. This case, in contrast, deals with whether Geske adequately raised an affirmative defense under § 160(b) before the ALJ.

Inc. v. NLRB, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983).

1.

In *Bill Johnson's*, the petitioner filed a state lawsuit against several current and former waitresses who had picketed its restaurant and filed unfair labor practice charges against it with the NLRB; the suit "alleged that the defendants had engaged in mass picketing, harassed customers, blocked public ingress to and egress from the restaurant, and created a threat to public safety. The complaint also contained a libel count . . . ." 461 U.S. 731 at 734, 103 S. Ct. 2161, 76 L. Ed. 2d 277. It sought temporary and permanent injunctive relief and damages. After a preliminary hearing, the state court denied preliminary injunctive relief to the restaurant.

In response to the restaurant's state tort suit, the waitresses filed a charge with the NLRB. They alleged that the suit was an attempt to retaliate against them, in violation of section 8(a)(1), (4) of the Act, 29 U.S.C. § 158(a)(1), (4). After an administrative hearing, an ALJ concluded that the restaurant had committed an unfair labor practice by filing a state lawsuit that "lacked a reasonable basis." *Id.* at 736. The Board adopted the ALJ's findings and the court of appeals enforced the Board's order.

On appeal, the Supreme Court considered "whether the Board may issue a cease-and-desist order to halt an allegedly retaliatory lawsuit filed by an employer in a state court." *Id.* at 737. Initially, the Court rejected the Board's position that a lawsuit filed for retaliatory reasons is an unfair labor practice, regardless of the underlying merit of the suit. Instead, the Court held that "the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the [NLRA]." *Id.* at 743.

Nonetheless, the Court held that, in appropriate cases, the NLRA authorizes the Board to "order[ ] the cessation of a state-court lawsuit." *Id.* at 744. The Court held that lawsuits that lack a

"reasonable basis" in law or fact do not enjoy First Amendment protection,[9] nor do they implicate a state's interest "in protecting the health and well-being of its citizens." *Id.* at 743 (quoting *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 303, 51 L. Ed. 2d 338, 97 S. Ct. 1056 (1977)). Thus, the Court concluded that "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by . . . the NLRA." 461 U.S. 731 at 744, 103 S. Ct. 2161, 76 L. Ed. 2d 277. *Cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993) (noting, in a discussion of analogous antitrust principles, that *Bill Johnson's* does not permit enjoining a lawsuit as an unfair labor practice under the National Labor Relations Act unless that suit is "baseless").

The Court then discussed the standard by which the Board should determine whether a state lawsuit is baseless. Emphasizing that the First Amendment right of access to the courts as well as the state's interest in maintaining domestic peace are at stake, the Justices held that the Act must be construed in a manner that would not permit the Board to "usurp the traditional fact-finding function of the state-court jury or judge," 461 U.S. 731 at 745, 103 S. Ct. 2161, 76 L. Ed. 2d 277, or "deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary." *Id.* at 746. "If [the] state plaintiff is able to present the Board with evidence that shows his lawsuit raises genuine issues of material fact," *id.* at 745-46, or, if his lawsuit raises "genuine state-law legal questions," *id.* at 746, the Board may not enjoin the prosecution of

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[9]Geske maintains that only those lawsuits that are "based on intentional falsehoods or on knowingly frivolous claims" lose their First Amendment protection. Petitioner's Br. at 15, 22, 38 (*citing Bill Johnson's*, 461 U.S. at 743 (quoting Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buff. L. Rev. 39, 60 (1980))). We think this is a misreading of *Bill Johnson's*. The Court lists "intentional falsehoods" and "knowingly frivolous claims" merely as two examples, and not as an exhaustive list, of types of claims that have no protection under the First Amendment. The Court's subsequent discussion makes clear that, for the purpose of enjoining a suit as an unfair labor practice under the NLRA, claims which present no material questions of fact or law have no First Amendment protection.

the suit, but rather must await the results of the state court adjudication. *Id.* at 749. If, on the other hand, there are no genuine factual issues or the plaintiff's state-law claim is "plainly foreclosed as a matter of law or is otherwise frivolous," *id.* at 747, the suit is baseless, and the Board may then proceed to determine whether the plaintiff filed it for retaliatory reasons in violation of section 8(a) of the Act, 29 U.S.C. § 158(a). The Court suggested that, "in making reasonable basis determinations, the Board may draw guidance from summary judgment and directed verdict jurisprudence, although it is not bound by either." *Id.* at 746 n.11.

2.

We now turn to the case before us. As a threshold matter, we note that, as the case has been presented to us, only the viability of the state libel claim must be considered. In the "Statement of Issues Presented for Review" in its brief, Geske refers only to its libel claim. Petitioner's Br. at 2. Even a line-by-line search, which we are not obliged to undertake, discloses only two passing references to the tortious interference claims in Geske's brief. Geske presented no explanation of how its tortious interference claims raised any material questions of fact or law.[10] Accordingly, we shall consider only whether the Board erred by requiring that Geske cease and desist from prosecution of its libel claim in state court.

Geske's contention is that the Board erred in determining that its state suit for trade libel was baseless. In the hearing before the ALJ, Geske and the Board agreed that *Vee See Constr. Co. v. Jensen & Halstead*, Ltd., 79 Ill. App. 3d 1084, 399 N.E.2d 278, 35 Ill. Dec. 444 (Ill. App. Ct. 1979) articulates the correct standard for a claim

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[10]In comparing an Illinois precedent to its complaint, Geske stated that the case "involved the torts of libel, slander, and business interference, similarly pled by Geske." Petitioner's Br. at 17. Later, Geske stated, "A review of [Geske's] Second Amended Complaint demonstrates that each of the three torts [alleged therein] has been upheld as non-preempted claims in previous cases." Id. at 36. Neither of these references explains what material issues of fact or law Geske's tortious interference claims raised.

of trade libel in Illinois.[11] Under *Vee See*, to state a cause of action for libel in situations in which the plaintiff is a corporation, the allegedly libelous statements "must assail the corporation's financial position or business methods, or accuse it of fraud or mismanagement." *Id.* at 281 (citation omitted). In its state tort complaint, Geske alleged that Local 150's use of the term "On Strike" on its picket signs falsely portrayed Geske's financial position by implying that the company was out of business or not a financially viable entity. According to Geske, the term "On Strike" falsely implied that Geske's employees were striking against the company, thus suggesting that it was not able to operate its business because it was involved in a labor dispute with its own employees.

We must determine whether, under the standards set forth by the Supreme Court of the United States in *Bill Johnson's*, Geske has stated a well-founded claim for trade libel under Illinois law. We conclude that Geske has not. First, the Union's pickets were not false, and, under Illinois law, only false statements are actionable as

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[11]On appeal, Geske submits that *Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 156 Ill. 2d 16, 619 N.E.2d 129, 188 Ill. Dec. 765 (Ill. 1993), establishes the correct standard by which to assess its libel claim. We cannot accept this submission. *Kuwik* articulates the standards for a libel claim in a case in which the plaintiff is an individual. *Vee See*, in contrast, articulates the standards for a cause of action for libel in situations--such as the present case--in which the plaintiff is a corporation. *Vee See*, 399 N.E.2d at 1088-89. Illinois has employed the standard for trade libel articulated in *Vee See* for fifty years. *See Harris Trust & Sav. Bank v. Phillips*, 154 Ill. App. 3d 574, 506 N.E.2d 1370, 1373, 107 Ill. Dec. 315 (Ill. App. Ct. 1987), *appeal denied*, 515 N.E.2d 108 (Ill. 1987); *American Int'l Hosp. v. Chicago Tribune Co.*, 136 Ill. App. 3d 1019, 483 N.E.2d 965, 969, 91 Ill. Dec. 479 (Ill. App. Ct. 1985); *Audition Div., Ltd. v. Better Bus. Bureau, Inc.*, 120 Ill. App. 3d 254, 458 N.E.2d 115, 118, 75 Ill. Dec. 947 (Ill. App. Ct. 1983); *Garber-Pierre Food Prod., Inc. v. Crooks*, 78 Ill. App. 3d 356, 397 N.E.2d 211, 214, 33 Ill. Dec. 878 (Ill. App. Ct. 1979); *Life Printing & Publ'g Co. v. Field*, 327 Ill. App. 486, 64 N.E.2d 383, 384 (Ill. App. Ct. 1946); *Life Printing & Publ'g Co. v. Field*, 324 Ill. App. 254, 58 N.E.2d 307, 310 (Ill. App. Ct. 1944). Geske offers no reason to believe an Illinois court hearing its libel claim would now change the standard applicable in a libel case in which the plaintiff is a corporation. Indeed, the Illinois court that heard Geske's motion for a preliminary injunction relied upon the *Vee See* standard. Accordingly, we shall utilize the *Vee See* standard for determining whether Geske has raised any material questions of fact or law in its claim against Local 150.

libelous. *Pandya v. Hoerchler*, 256 Ill. App. 3d 669, 628 N.E.2d 1040, 1043, 195 Ill. Dec. 576 (Ill. App. Ct. 1993); *Zaret v. Joliet Park Dist.*, 91 Ill. App. 3d 225, 415 N.E.2d 659, 660, 47 Ill. Dec. 654 (Ill. App. Ct. 1980). The pickets clearly stated that Local 150 was on strike "for recognition as [the] majority bargaining representative of [Geske's] operating engineer employees." Local 150 was indeed lawfully picketing for that purpose.

Nevertheless, Geske maintains that the phrase "On Strike" is susceptible of only one meaning: that the company's employees were involved in a labor dispute with the company, and therefore refused to work. There are two problems with Geske's position, however. First, under Illinois law, to determine whether a statement is libelous, a court must read the statement as a whole. *Audition Div.*, 458 N.E.2d at 119. Reading the Union's picket signs as a whole, we conclude that there is no reasonable way to interpret the statements as Geske suggests.[12] Second, even reading the "On Strike" statement on the signs by itself, that statement validly conveys the lawful recognitional objective of the picket. *See, e.g., Retail Clerks' Int'l Union & Retail Store Employees' Union, Local 655 v. Quick Shop Mkts., Inc.*, 604 F.2d 581, 586 (8th Cir. 1979) (picket signs stating "Employees on Strike" demonstrates a recognitional objective); *United Union of Roofers, Local Union No. 2*, 296 N.L.R.B. 585, 589 (1989) ("The use of 'on strike' signs has . . . been found to be evidence of a recognitional or organizational objective."); *United Bhd. of Carpenters, Local 1849*, 208 N.L.R.B. 461, 462 (1974); *Hotel, Motel & Club Employees' Union, Local 568*, 147 N.L.R.B. 1060, 1068 (1964); *Hoisting & Portable Eng'rs Local Union 101*, 140 N.L.R.B. 1175, 1187 (1963).[13] Thus, we conclude that Local

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[12]Illinois law also allows a cause of action for libel per quod--a publication not libelous on its face, but rendered defamatory by extrinsic facts or innuendo. *Audition Div.*, 458 N.E.2d at 119. Geske does not advance this theory before us, and therefore we need not consider it. Moreover, Geske has failed to allege in this case any additional facts that might support a claim of libel per quod under Illinois law.

[13]Geske submits that *United Bhd. of Carpenters and Hotel, Motel & Club Employees' Union* actually support its position. We cannot agree with Geske's

(continued...)

150's picket signs were not false, and accordingly, that Geske did not state a well-founded claim for trade libel in its state lawsuit.

Moreover, even if Local 150's picket signs did falsely imply that Geske's workers were striking, those signs were not defamatory under the *Vee See* standard. There is nothing about a company's employees being on strike that suggests that the company has engaged in fraud or mismanagement or that necessarily assails the company's financial position or business methods; even the best managed and most financially sound companies may experience labor strikes. Once again, we conclude that Geske failed to state a well-founded trade libel claim in its state lawsuit.

3.

The second element of the *Bill Johnson's* test requires the Board to determine whether Geske filed its suit against Local 150

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[13](...continued)
interpretation of these cases.

In *United Bhd. of Carpenters*, "the ultimate question presented [was] whether [the union,] in picketing [the employer] with a recognitional object[,] . . . violated Section 8(b)(7)(C) of the Act [by picketing for more than thirty days without filing a petition for an election]. . . . Also presented [was] the question of whether the publicity proviso in Section 8(b)(7)(C) [allowing picketing for non-recognitional purposes for more than thirty days] immunized the picketing from illegality." 208 N.L.R.B. at 464. The Board ruled that the term "Strike" on the union's picket signs indicated that the signs were intended for recognitional purposes, rather than for publicity purposes. *Id.* at 462. The Board did not hold, however, that the use of the word "strike" indicated that a company's own employees were on strike, rather than indicating a recognitional picket by a union.

Similarly, in *Hotel, Motel & Club Employees' Union*, the union claimed that its picket, which lasted for more than thirty days, was only to advise the public that the employer operated a nonunion establishment, rather than for recognition as the representative of the company's employees. 147 N.L.R.B. at 1062. The union displayed picket signs containing the phrase "On Strike." *Id.* at 1065. The Board found that "an object of the union's picketing . . . was . . . to obtain recognition from [the employer], within the meaning of Section 8(b)(7)." *Id.* at 1068. Again, there was no suggestion in the Board's opinion that the use of the term "On Strike" signaled a strike by employees rather than a recognitional picket by a union.

for retaliatory reasons. The Board's determination of Geske's motive in filing suit is a factual determination, to which we defer as long as it is supported by substantial evidence in the record. *NLRB v. International Union of Operating Eng'rs, Local 520*, 15 F.3d 677, 679 (7th Cir. 1994). Substantial evidence is more than a scintilla of evidence but less than a preponderance; it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971) (citation omitted); *Diaz v. Chater*, 55 F.3d 300, 305 (7th Cir. 1995).

The ALJ stated numerous factors based upon which she concluded that Geske filed suit for retaliatory reasons.[14] Geske challenges whether this evidence is sufficient to support the Board's determination that the Company maintained the state court action for retaliatory reasons. This claim is completely devoid of merit. The evidence relied upon by the ALJ is ample to support her conclusion that Geske filed its state suit for retaliatory reasons. Motive or intent almost always must be inferred from circumstantial evidence. As long as the Board's determination is premised on substantial evidence, its conclusion is both valid and binding on this court. This principle must govern even when, in reaching a decision, the ALJ

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[14]The ALJ recites the following factors as supporting her conclusion: The subject matter of Geske's suit consisted largely of lawful organizational picketing protected by the NLRA. Geske officers or agents falsely told Local 150 picketers that the temporary restraining order Geske had obtained required the Union to remove all picket signs. Geske officers or agents falsely told a union member at one of Geske's suppliers that the temporary restraining order required him to load supplies onto a Geske truck after he chose to honor Local 150's picket. Geske filed a motion to amend the temporary restraining order to ban all picketing of Geske facilities or trucks, although there was no legal basis for such an injunction. Soon after the picketing began, Geske's General Manager told one of Local 150's business agents that he had no right to be there and to "get out of here." Geske's General Manager demanded that a Local 150 business agent tell her whether any Geske employee had signed anything from the union; she instructed Geske employees not to talk to any of the picketers or to sign anything, and interrogated employees concerning their discussions with the union representatives. Finally, during a meeting between Geske and Local 150 representatives, one of Geske's representatives stated that the company knew the identities of the employees who had supported the Union's efforts and that those individuals would "get theirs."

discredited substantial evidence favorable to the other party. *See Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc); *see also Diaz*, 55 F.3d at 305-06. It is the duty and the prerogative of the ALJ to choose between conflicting evidentiary submissions. As long as the ALJ's decision is supported by substantial evidence, we cannot take the contrary view even though there is other evidence in the record that would support such a view.

4.

Geske offers a number of responses to the Board's conclusion that its libel suit against Local 150 was baseless. None of these responses is availing.

First, Geske repeatedly invokes its First Amendment right to seek redress of grievances in state courts. As the Supreme Court held in *Bill Johnson's*, however, the First Amendment protects only well-founded lawsuits. Because Geske's suit is baseless, Geske has no right under the First Amendment either to file or to prosecute that suit.

Second, Geske repeatedly maintains that the NLRA does not preempt state libel actions in the context of labor disputes. *See Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 15 L. Ed. 2d 582, 86 S. Ct. 657 (1966) (holding that malicious libel is not preempted). Neither the NLRB nor the Union contends to the contrary. Their sole submission is that this suit is baseless and retaliatory and therefore an unfair labor practice. It is the bringing of a baseless state action that constitutes the unfair labor practice.

Third, Geske claims that, because it has had only a hearing on its motion for a preliminary injunction in state court and not a trial on the merits of its case, its lawsuit is still pending in state court. According to Geske, the NLRB was therefore without authority to enjoin the prosecution of that suit. As our earlier discussion of *Bill Johnson's* notes, although the Board must act with great circumspection in this area because important individual rights and state prerogatives are at stake, the Board need not allow a baseless state action that is retaliatory in character to continue to interfere with the

course of labor management relations. Rather, *Bill Johnson's* holds that "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with [a retaliatory motive]." 461 U.S. at 744. Our examination of the decisions of the state trial and appellate courts makes clear that the state courts considered the trade libel allegation of Geske to be, on the evidence submitted by Geske, without foundation. As we have noted earlier, Geske never informed the Board, in concrete terms, of any additional evidence that it had to offer.

Fourth, Geske submits that its lawsuit was not baseless because it was validly premised upon the precedent established in *Lowe Excavating Co. v. International Union of Operating Eng'rs Local No. 150*, 180 Ill. App. 3d 39, 535 N.E.2d 1065, 129 Ill. Dec. 300 (Ill. App. Ct.), *appeal denied*, 541 N.E.2d 1107 (Ill.), *cert. denied*, 493 U.S. 975, 110 S. Ct. 499, 107 L. Ed. 2d 502 (1989). According to Geske, *Lowe* creates a separate trade libel standard in Illinois for allegedly libelous statements uttered in the context of a labor dispute. This contention, however, rests upon a misunderstanding of that case. In *Lowe*, "the sole issue on appeal [was] whether the [NLRA] deprives a State court of jurisdiction to enjoin a union from picketing with placards that contain knowingly false statements, or statements made in reckless disregard for the truth." *Id.* at 1068. Thus, *Lowe* did not establish a standard for causes of action for trade libel in labor disputes.[15]

Fifth, Geske suggests that the Board erred by requiring it to produce at the administrative hearing all the evidence it intended to introduce in the state court trial on its lawsuit. According to Geske, the Board thereby erroneously conducted a "virtual trial on the

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[15]*Lowe* did discuss, in dicta, the standards for a claim of trade libel. But even in that discussion, *Lowe* stated that "while truth or falsity is an important element in the tort of trade libel, it is certainly not the only issue to be considered. The issue[ ] of injury to reputation . . . must also be considered." *Id.* at 1071. The element "injury to reputation" is an obvious reference to the *Vee See* standards impugning a corporation's financial position or business practices. Thus, *Lowe* clearly does not support Geske's claim that, to state a claim for trade libel in the context of a labor dispute, it need prove only that Local 150 made false statements with knowledge of their falsity or reckless disregard for their truth.

merits," which *Bill Johnson's* prohibits. We cannot agree with Geske's characterization of the situation. In order to carry out its mandate under *Bill Johnson's* to determine whether a lawsuit is baseless, the Board must examine the plaintiff's evidence to determine whether it raises any material questions of fact. In this case, the Board examined all the evidence Geske produced at the hearing on its motion for a preliminary injunction and correctly concluded that the evidence raised no material question of fact. Geske asserted that it had "lots of other evidence" to support its suit, but refused to produce that evidence. When Geske elected not to produce any other evidence in support of its case, the Board correctly ruled, based on the evidence before it, that Geske's suit was baseless. Just as a party in a federal civil case may not avoid summary judgment simply by asserting that he has additional evidence he will produce at trial, Fed. R. Civ. P. 56(e), we do not think a respondent before the NLRB can avoid having his state lawsuit enjoined merely by asserting that he has additional, undisclosed evidence that renders his suit well-founded.

Sixth, Geske asserts that the Board erred by concluding that its lawsuit was baseless before it had the opportunity to conduct any discovery. However, Geske never made any attempt, by affidavit or otherwise, to state what evidence it expected to obtain through discovery or why it could not yet produce that evidence. One of the reasons the Court held that the NLRB may enjoin baseless lawsuits is that such suits "may be used by an employer as a powerful instrument of coercion or retaliation." *Bill Johnson's*, 461 U.S. at 740. The Board's authority to deal with unfair labor practices would be significantly impeded were we to hold that it could not require the cessation of a baseless lawsuit until after the often lengthy and expensive process of discovery. Accordingly, we hold that in cases, such as the present one, in which the plaintiff in a state lawsuit provides no evidentiary basis for that suit and fails to describe what evidence he expects to obtain through discovery and to explain why he has not been able to obtain that evidence, the Board properly may enjoin the prosecution of that suit prior to discovery.

Finally, Geske maintains that the Board improperly found that it had violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

That section makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in [section 7 of the Act]." Section 7, 29 U.S.C. § 157, guarantees employees the right to form, join and assist unions and to bargain collectively. Geske submits that unions have no rights under section 7, and because it sued Local 150 rather than its employees, it did not violate its employees' rights under section 7. Accordingly, Geske concludes, it did not commit an unfair labor practice under section 8(a)(1).

We cannot accept Geske's contention. It is true that "by its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532, 117 L. Ed. 2d 79, 112 S. Ct. 841 (1992). Nevertheless, "the right to organize is at the very core of the purpose for which the NLRA was enacted," *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 207 n.42, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978). Because employees' "right of self-organization depends in some measure on their ability to learn the advantages of self-organization from others," Lechmere, Inc., 502 U.S. at 532 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113, 100 L. Ed. 975, 76 S. Ct. 679 (1956) (internal punctuation omitted)), the Court has held that unions possess "derivative rights," *Sears*, 436 U.S. at 207 n.42, under section 7 to engage in organizational activities in order to protect the employees' right to organize. *See NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994) (same). Thus, Geske violated its employees' section 7 rights to organize by filing a baseless lawsuit against Local 150 in response to the Union's lawful organizational picketing. *See Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1089-90 & n.4 (9th Cir. 1995) (baseless libel suit against union may be an unfair labor practice that interferes with employees' rights under section 157).

Geske suggests that, because *Bill Johnson's* refers only to baseless lawsuits brought by employers against employees, the Supreme Court meant, by negative implication, to exclude from the scope of section 8(a)(1) baseless lawsuits against unions. We believe, however, that by referring only to baseless lawsuits against employ-

ees, the Supreme Court simply addressed the case before it. Cases subsequent to *Bill Johnson's* have applied the holding and reasoning of that case in a variety of labor contexts, regardless of whether the plaintiff was an employer or the defendant was an employee. *See NLRB v. International Union of Operating Eng'rs, Local 520*, 15 F.3d 677 (7th Cir. 1994) (*Bill Johnson's* analysis applied to suit by union against union member); *Diamond Walnut Growers*, 53 F.3d at 1087-90 (*Bill Johnson's* analysis applied to suit by employer against union); *Gibson Greetings, Inc. v. NLRB*, 311 U.S. App. D.C. 314, 53 F.3d 385, 394 (D.C. Cir. 1995) (same in dicta); *Hoeber v. Local 30, United Slate, Tile & Composition Roofers*, 939 F.2d 118, 126 (3d Cir. 1991) (*Bill Johnson's* analysis applied to suit by union against employer). Notably, Geske invites our attention to no case in which *Bill Johnson's* was limited to suits brought by employers against employees.

Because nothing in the language or reasoning of *Bill Johnson's* supports Geske's position and because the courts of appeals have consistently taken the contrary position, there is no reason for us to accept the reading urged on us by Geske. It would be anomalous to hold that an employer may not interfere with its employees' right to organize by filing baseless lawsuits against them, but that it may achieve the same result by filing a baseless lawsuit against a union attempting to organize the employees.

Thus, we cannot accept Geske's responses. We hold that the NLRB correctly determined that Geske committed an unfair labor practice, in violation of section 8(a)(1) of the Act, by filing a baseless lawsuit against Local 150 in retaliation for the Union's lawful recognitional picketing of Geske's business.

B. *Attorneys' Fees*

Geske next submits that the Board erred by ordering it to reimburse Local 150 and the other defendants named in Geske's state suit for the legal expenses they incurred in defense of that litigation. Having determined that the Board correctly found that Geske committed an unfair labor practice by filing its state lawsuit, our review of its remedial order is extremely limited. Section 10(c)

of the Act, 29 U.S.C. § 160(c), grants the NLRB the authority to devise remedies for unfair labor practices to effectuate the policies underlying the NLRA.

> The Board's power [to devise remedies under § 10(c)] is a broad discretionary one, subject to limited judicial review. The relation of remedy to policy is peculiarly a matter for administrative competence. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience. The Board's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964) (citations and internal punctuation omitted); *see also Rock-Tenn Co. v. NLRB*, 69 F.3d 803, 810 (7th Cir. 1995). Geske has not made such a showing in this case.

We need not dwell at length on Geske's assertion that its state lawsuit was neither baseless nor retaliatory. We have already discussed these matters at length and concluded that the Board's determination to the contrary is well supported by the record.

Geske next asserts that, because *Bill Johnson's* refers to reimbursement of "employees" whom the employer has wrongfully sued, 461 U.S. at 747, the Board has no authority under *Bill Johnson's* to order reimbursement in this case to Local 150. Again, we decline to draw such a categorical inference by negative implication. As our colleagues in the District of Columbia Circuit noted in *Gibson Greetings, Inc. v. NLRB*, 311 U.S. App. D.C. 314, 53 F.3d 385, 394 (D.C. Cir. 1995), *Bill Johnson's* does permit the Board to award costs that a union incurs in defending against a baseless, retaliatory lawsuit that is found to be an unfair labor practice. The Ninth Circuit, recognizing that baseless litigation against a union can have an impact on the rights of the employees, has also enforced orders of the Board that required that the union be recompensed for its expenses in defending against the suit. *See*

Diamond Walnut Growers, 53 F.3d at 1089-90.[16] Sitting en banc, we already have noted that the Board may award attorneys' fees to unions when they are subjected to patently frivolous litigation before the Board in the course of an unfair labor practice proceeding. *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1325-27 (7th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 936, 112 S. Ct. 1474, 117 L. Ed. 2d 618 (1992). That situation is highly analogous to the situation before us today. Whether a union is subjected to frivolous litigation as part of the underlying unfair labor practice or during the adjudication of another unfair labor practice allegation, there can be a similar impact on the rights of the workers under the Act.

On the record in this case, we believe that the Board's inclusion of this remedy in its order effectuates the policies underlying the NLRA. The injured party, the Union that plays a necessary part in the organizational activities of the employees, is compensated for expenses that it would not have incurred in the absence of the baseless state law suit. An adequate deterrent to unlawful attempts by employers to hinder organizational attempts by unions is provided. A baseless and retaliatory lawsuit against a union can be

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[16]It does not appear that the propriety of the Board's ordering such reimbursement was squarely placed before the court of appeals in *Diamond Walnut Growers*. We are aware of the Sixth Circuit's decision in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237 (6th Cir. 1995). We do not believe that the case is necessarily at odds with the view of the District of Columbia Circuit in *Gibson Greetings, Inc. v. NLRB*, 311 U.S. App. D.C. 314, 53 F.3d 385 (D.C. Cir. 1995). The court's treatment of the subject is brief, and it appears that the court's chief concern was that the Board had not adequately justified the award of fees to the non-employee union members. We find it difficult to read the court's holding as establishing a categorical rule that would preclude such an award in all circumstances. Certainly, we would expect that such a significant restriction on the power of the Board to fashion appropriate relief would have received a far more plenary treatment.

As we already have made clear, we do not think *Bill Johnson's* can be read to distinguish between employees and nonemployee union organizers insofar as the protections against baseless lawsuits or the remedies available under the Act are concerned. When the baseless and retaliatory litigation against the Union impacts on the statutory protections afforded employees under the Act, the Board has the authority to consider the reimbursement of the Union's litigation expenses as part of the remedy necessary to effectuate the policies of the Act.

a powerful weapon in the hands of an unprincipled employer. Such an employer need not win its lawsuit against a union to thwart the Union's attempts to organize workers; rather, the employer need only impose substantial costs and delays upon the Union. The Board's remedies in the face of such a potential abuse must include an economic disincentive for engaging in such conduct. Accordingly, we hold that, on this record, the Board's order directing Geske to reimburse Local 150 and the other defendants for their legal costs incurred in defending against Geske's lawsuits was both within the Board's authority under section 10(c) and effectuates the policies underlying the Act.

Conclusion

The NLRB correctly held that, under the Illinois standard for trade libel, Geske's state lawsuit against Local 150 and the other defendants was clearly baseless. Moreover, the Board's determination that Geske filed the lawsuit for retaliatory reasons is supported by substantial evidence in the record. Accordingly, the Board properly enjoined the further prosecution of that lawsuit in state court and correctly ordered Geske to reimburse the defendants for the expenses they incurred in defending against that suit. Geske's petition for review is therefore denied, and the Board's cross-application for enforcement of its order is granted.

ENFORCEMENT GRANTED; REVIEW DENIED

NATIONAL LABOR RELATIONS BOARD
317 N.L.R.B. No. 26

Geske and Sons, Inc. and International Union of Operating Engineers, Local 150, AFL-CIO.
Case 33-CA-9557-2

April 26, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND TRUESDALE

On February 24, 1994, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed a brief in support of the judge's decision and a statement in response to the Respondent's exceptions. The Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

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[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2]The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

We deny the Respondent's request, in effect, to reopen the record to include a purported affidavit of Matt Schaltz and a letter to the Respondent's counsel from a Board agent. Sec. 102.48(d)(1) of the Board's Rules and Regulations provides that the record will be reopened if evidence sought to be introduced has become available only since the close of the hearing and is newly discovered. The evidence now proffered by the Respondent was available at the time of the hearing, and the Respondent did not present it to the judge for consideration.

I. PROCEDURAL ISSUES

Before addressing the substantive allegations of the complaint, we must resolve two procedural issues concerning the Respondent's exceptions and supporting brief.

A. On April 29, 1994,[3] the Respondent timely filed exceptions (37 pages in length) to the judge's decision and a supporting brief (50 pages in length). By letter dated May 2, the Deputy Executive Secretary of the Board, acting on behalf of the Board, rejected the Respondent's exceptions and brief because these documents were not in conformity with the requirements set forth in Section 102.46(b)(1) of the Board's Rules and Regulations.[4] The exceptions document contained argument in support of the exceptions and included

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[3]All dates are in 1994, unless otherwise indicated.

[4]Sec. 102.46(b)(1) reads, in pertinent part:

> Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50- page limit as for briefs set forth in section 102.46(j).

citations of authority which were used in an argumentative manner. The two documents, which totaled 87 pages in length, exceeded the 50-page limit proscribed by Section 102.46(j) of the Board's Rules.[5] The Deputy Executive Secretary returned the exceptions document and the brief to the Respondent. The Respondent was given an opportunity to revise and refile its exceptions document and brief "in proper format on or before May 9."[6]

On May 9, the Respondent filed its revised exceptions (26 pages in length) and the 50-page brief which had been previously submitted on April 29. By letter dated May 12, the Deputy Executive Secretary notified the Respondent that its revised exceptions were still not in conformity with Section 102.46(b)(1) for the reason stated in the May 2 letter. Accordingly, the Deputy Executive Secretary rejected the Respondent's brief in support of exceptions, and accepted and forwarded only the Respondent's revised exceptions to the Board for review. In the letter, the parties were also notified that answering briefs to the Respondent's exceptions were due May 23.[7]

On May 17, the Respondent filed its "Motion to the Board to Accept the Attached Amended Revised Exceptions for Filing Instanter with its Previously Filed Brief." Attached to its motion

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[5]Sec. 102.46(j) reads, in pertinent part:

> Any brief filed pursuant to this section shall not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (h) of this section, shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 10 days prior to the date the brief is due.

[6]We note that the Respondent has never sought permission to exceed the 50-page limit for briefs set by Sec. 102.46(j) of the Board's Rules by filing a written motion to that effect.

[7]On May 19, June 16, and July 12 and 15, the Charging Party requested an extension of time in which to file answering briefs. These requests were granted. The due date for answering briefs was ultimately extended to August 3.

were the Respondent's amended revised exceptions (20 pages in length). In its motion, the Respondent asserts that it had "made a good faith effort to comply with [Board Rule Section 102.46(b)(1)]" and that the other parties have not suffered any prejudice by these good-faith efforts. The Respondent further states that it was confused by a purported conflict in the Board's Rules in that "Section 102.46(b)(1) requir[es] the party to 'state the grounds' for the exception, but that [the exceptions document] also 'shall not contain any argument or citation.'" The Respondent claims that its uncertainty about this requirement led to the alleged failure on its part to fully comply with Section 102.46(b)(1). The Respondent requests that, for purposes of reviewing the judge's decision, the Board accept its amended revised exceptions and its previously submitted 50-page brief. In the alternative, if the instant motion is denied, the Respondent requests that its original exceptions filed on April 29, and not its May 9 revised exceptions document, be accepted and considered by the Board in our deliberations. 14[8]

By order dated May 19, the Deputy Executive Secretary notified the parties that the Respondent's motion had been forwarded to the Board for consideration. In addition, the Respondent's April 29, May 9 revised exceptions, May 17 amended revised exceptions, and its 50-page brief were also forwarded to the Board in connection with our consideration of the Respondent's motion.[9] Neither the General Counsel nor the Charging Party has filed any opposition to the Respondent's motion or to the Board's acceptance of the May 17 amended revised exceptions and the April 29 brief.

Upon careful review, we agree that the April 29 exceptions document contains considerable argument, and the Respondent, therefore, failed to fully or even substantially comply with the

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[8]For this reason, we find it unnecessary to pass on whether the Respondent's May 9 revised exceptions meet the requirements of Sec. 102.46(b)(1) and Sec. 102.46(j).

[9]The General Counsel and the Charging Party were properly served with all these documents.

requirements of Section 102.46(b)(1) and Section 102.46(j).[10] In the circumstances presented here, as described above, however, we grant the May 17 motion and accept the Respondent's amended revised exceptions and supporting brief. We note that there was no opposition to the motion from the other parties, no challenge to the Respondent's assertions of good-faith efforts, and no showing of prejudice to the other parties.

Notwithstanding this result, we wish to stress the importance of close attention to the requirements of Section 102.46(b) (1) and Section 102.46(j) by the party filing exceptions. We emphasize that a person should not expect in the future, or consider as now the norm, that the party filing exceptions will be afforded several opportunities to put its exceptions in proper form in conformity with the filing requirements of the Board's Rules. In addition, we do not mean to suggest by our ruling in this case that the mere inclusion of a case name and citation necessarily runs afoul of Section 102.46(b) (1). There may be instances in which a case citation is the most concise means possible of identifying the legal issue on which exception is taken -- e.g., exception is taken "to the judge's failure to find that the Respondent unlawfully deprived employees of their *Laidlaw* [171 NLRB 1366 (1968)] reinstatement rights," or exception is taken "to the judge's failure to find that the Union's picketing violated the standard of *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950)." Any use of a case citation beyond the mere identification of a legal issue is likely to verge on argument, however, and must be confined to the supporting brief.[11]

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[10]Cf., *America's Best Quality Coatings Corp.*, 313 NLRB 470 fn. 1 (1993) (substantial compliance).

[11]This approach is entirely consistent with the context in which our rules with respect to exceptions and briefs were adopted. Effective October 15, 1982, the Board revised its Rules and Regulations to place a 50-page limit on briefs filed with the Board following transfer of the case to the Board. Thus, under Sec. 102.46(j) of the Board's Rules, unless a party receives permission to file an enlarged brief, briefs in support of exceptions and answering briefs are limited to 50 pages. Thereafter, the Board was faced with a recurring issue that arose when a party filed a 50-page supporting brief, but included in its exceptions document "argument and

(continued...)

B. On July 12, the Respondent filed a motion to add a clarifying exception to its May 17 amended revised exceptions document. The Respondent asked leave to file an 87th exception, which it called a "clarifying" exception to its "central" issue relating to the Board's decisions in *Loehmann's Plaza*, 305 NLRB 663 (1991), and *Davis Supermarket*, 306 NLRB 426 (1992). By letter dated July 22, the Deputy Executive Secretary, acting on behalf of the Board, denied this motion as untimely, but he further noted, albeit erroneously, that the motion was not supported by an affidavit as required by Section 102.111(c) of the Board's Rules. In fact, attached to the motion was an affidavit by the Respondent's counsel, Michael E. Avakian. On August 8, the Respondent filed a motion for reconsideration of the July 22 ruling and rejection of its "clarifying" exception.

We reaffirm our July 22 ruling that the Respondent's July 12 motion was untimely. We find that the Respondent has not shown good cause for filing out of time, as required by Section 102.111(c) of the Board's Rules.[12] The July 22 letter's inadvertent administra

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[11](...continued)
or citation of authority," thereby exceeding (intentionally or unintentionally) the 50-page limit on briefs envisioned by the Rule. Effective June 1, 1986, in an effort to resolve this problem, the Board published in the Federal Register a notice of its intention to amend its Rules "to provide a clearer description of the exceptions document and the briefs, and, therefore, to facilitate administration of the 50-page limit on briefs by precluding placement in the exceptions of material that appropriately belongs in the brief." Thus, Sec. 102.46(b) (1)(iv) requires that each exception "shall concisely state the grounds for the exception." The Rule further provides that "[i]f a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of exceptions, but such matters shall be set forth only in the brief." (Emphasis added.) This amendment essentially eliminated the confusion which was prevalent in this area before the 1986 Rules revision.

[12]Sec. 102.111(c) reads, in pertinent part:

> In unfair labor practice proceedings, motions, exceptions, answers to a complaint or a backpay specification, and briefs may be filed within a reasonable time after the time prescribed by these rules only upon good cause (continued...)

tive error regarding the inclusion of an affidavit does not affect our ruling.

Even assuming arguendo that the July 12 motion was timely, we do not see how the proffered "clarifying exception" would clarify the Respondent's amended revised exceptions, which are part of the record in this case. The clarifying exception purports to articulate the Respondent's contentions regarding the appropriateness and applicability of the Board's decision in Loehmann's Plaza, supra, a case relied on by the judge to find that the Respondent's state court lawsuit was preempted and to remedy the unfair labor practice. The Respondent's amended revised exceptions 25, 75, and 84 directly address the issue of preemption and the appropriateness of the remedy. The Respondent admits as much in the affidavit attached to its July 12 motion, in which its counsel, Michael E. Avakian, states that "[a]t all times, Respondent believes the question of law has been [e]xcepted to. . . " In any event, as discussed infra, we do not reach the preemption issue because we adopt the judge's finding of a violation of Section 8(a)(1) of the Act based on the other legal theory advanced by the General Counsel.

II. THE 8(A)(1) VIOLATION

We agree with the judge's findings and conclusion that the Respondent violated the Act, beginning on September 5, 1991, by filing, maintaining, and prosecuting a state court lawsuit against the Charging Party and Chauffeurs, Teamsters and Helpers, Local 301, and their agents. We agree with the judge, for the reasons she fully

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[12](...continued)
shown based on excusable neglect and when no undue prejudice would result. A party seeking to file such motions, exceptions, answers, or briefs beyond the time prescribed by these rules shall file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts.

sets forth, that the lawsuit was without reasonable basis[13] and was motivated by an intent to retaliate against the Charging Party's protected concerted activity, i.e., seeking to organize the Respondent's employees by engaging in lawful recognitional picketing. We also adopt the recommended remedy in this regard.

In light of our finding that the lawsuit violated the Act because it was baseless and had a retaliatory motivation, we find it unnecessary to pass on whether the suit also violated the Act because it was preempted by Federal law. We shall modify the Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Geske and Sons, Inc., Crystal Lake, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and renumber the subsequent subparagraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

Judith T Poltz, Esq., for the General Counsel.
Michael Ernest Avakian, Esq., of North Springfield, Virginia, and *General C. Smetana, Esq.*, of Chicago, Illinois, for the Respondent.
Lois E. Sigman, Esq., of Chicago, Illinois, for the Charging Party.

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[13]In agreeing that the lawsuit lacked a reasonable basis, Member Stephens does not rely simply on the Respondent's lack of success in the state courts. He independently concludes that the Respondent's claims were meritless under the appropriate Federal standard set out in *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 61-65 (1966), and *Letter Carriers v. Austin*, 418 U.S. 264, 272-273 (1974). *Phoenix Newspapers*, 294 NLRB 47, 49 fn. 16 (1989).

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Chicago, Illinois, on December 3 and 4, 1992, pursuant to a charge filed by International Union of Operating Engineers, Local 150, AFL-CIO (Operating Engineers Local 150) against Respondent Geske and Sons, Inc. (Geske) on September 19, 1991, an amended charge filed on March 24, 1992, and a complaint issued on March 30, 1992, and amended on March 31 and April 30, 1992.

The complaint as of March 31, 1992, alleged that Geske violated Section 8(a)(1) of the National Labor Relations Act (the Act) by filing a state court lawsuit against Operating Engineers Local 150 and Chauffeurs, Teamsters and Helpers, Local 301 (Teamsters Local 301) about September 5, 1991; by filing an amended complaint in state court against them and Chuck August,[1] Robert Paddock, Gary Laney, Michael Quigley, Kal Lester,[2] Angel Delrivero, Bud Layoff,[3] and Mike Haffner, about September 27, 1991; and by maintaining and prosecuting this September 5 and 27 lawsuit; which lawsuit included certain causes of action (for trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage) which are without reasonable basis and were motivated by an intent to retaliate against the protected concerted activity of Operating Engineers Local 150 in seeking to organize Geske's employees by engaging in lawful recognitional picketing. Of the eight individual defendants, two

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[1]So referred to in the complaint, in the instant record, and in this decision. His legal name is Charles L. August.

[2]So referred to in the complaint, in the instant record (which sometimes uses "Cal" as a spelling), and in certain parts of this decision. His legal name is Kevin Lester.

[3]So referred to in the complaint, in the instant record, and in certain parts of this decision. His legal name is Reginald Layoff.

(Layoff and Haffner) were connected with Teamsters Local 301, and the rest were connected with Operating Engineers Local 150. The April 30, 1992 amendment to the instant complaint added the allegation that Geske violated Section 8(a)(1) since about September 5, 1991, by filing, maintaining, and prosecuting the foregoing lawsuit with causes of action for trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage, that are preempted by the Act.

The September 1991 state court lawsuit in question requested injunctive relief as well as damages. The state trial court issued a temporary restraining order against Operating Engineers Local 150 and Teamsters Local 301 following an ex parte proceeding where no witnesses testified. Thereafter, the state trial court conducted a 9-day hearing where Operating Engineers Local 150 and Teamsters Local 301 were represented by counsel. After Geske had concluded its case in chief as to its request for a preliminary injunction, and before the defendants had begun to put in their case, the state trial court denied the requested preliminary injunction on the ground, inter alia, that Geske had little likelihood of success on the merits. For reasons which will appear infra, the defendants in the state court proceeding have never had an opportunity to put in their case to the state trial court. Most of the record in the state court proceeding was received in evidence in the unfair labor practice proceeding before me. The parties before me agreed that I could accept that transcript in the same way that I would be able to handle a transcript in a case heard by an administrative law judge who died. However, because the defendants in the state court proceeding have not had an opportunity to put in a case there, I am reluctant to base factual findings on that record alone. Accordingly, as to the state court transcript, I have generally limited myself to merely summarizing the testimony, and have based no findings thereon except where specifically stated.[4]

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[4]At the beginning of the hearing before me, Geske's counsel, Gerard C. Smetana, who on Geske's behalf actively participated in the hearing before the state trial court, stated, "The fact that we happened not to prevail on a preliminary injunction hearing, and the case is still there, doesn't mean we can't prove our case

(continued...)

Local 150's initial charge in the instant case was filed on September 19, 1991; alleged that Geske had violated Section 8(a)(1) of the Act; and went on to allege, "Since on or about September 7, 1991, [Geske] has unlawfully interfered with, restrained and/or coerced various individuals, including Butch Powers (see infra, part III,P), in the exercise of their rights guaranteed by Section 7 of the Act, including, but not limited to, the honoring of IUOE, Local 150's lawful primary picket by threatening such individuals with the improper filing of legal proceedings seeking state, criminal and/or civil sanctions for their voluntary refusal to load Employer trucks." The amended charge was filed on March 24, 1992, and alleged, in part, "On or about September 5, 1991, [Geske] filed a state court lawsuit . . . against Operating Engineers Local 150 and Teamsters Local 301 and on September 25, 1991 filed a Third Amended complaint which named as defendants . . . Local 150, Chuck August, Robert Paddock, Gary Laney, Michael Quigley, Kal Lester, and Angel Delrivero . . . Local Union 301, Bud Layoff, and Mike Haffner. The filing on [sic] and prosecution and maintenance of this lawsuit since September 5, 1991 are unfair labor practices in violation of Section 8(a)(1)." Geske's opening brief (at 5) alleges

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[4](...continued)
[because] we've got lots of other evidence to prove our case. We . . . put on certain evidence which we thought . . . was enough to get a preliminary injunction." On the second and last day of the hearing before me, Smetana stated that "some of the best evidence we have is not yet in the [state court] record. And, therefore . . . it is not appropriate as a matter of law for this Court to interfere with the State court proceeding until we put in our case on the merits." At that point, as to certain questions which Smetana sought to put to General Counsel witness Chuck August on cross-examination, I sustained the Charging Party's and the General Counsel's objections on the ground that these questions about August's statements on the picket line exceeded the scope of the direct examination (see Fed.R.Evid. 611(b)). At the same time, I stated that Smetana could call the witness as his own for the purpose of adducing the testimony in question as part of his own case. Smetana chose not to do so. Although Chuck August is a business agent of Local 150 and obviously identified with it, Smetana could have called him under Rule 611(c) of the Federal Rules of Evidence and, indeed, did call him as Geske's witness during the state court trial, and adduce testimony from him about his statements on the picket line (see infra, part III,I,1). This colloquy aside, consideration of Geske's evidence adduced before me but not (so far as I can ascertain) before the state trial court fails to enlighten me as to the nature of this "lots of other evidence."

that the amended charge "is entirely different from its predecessor. Most of the acts complained of are outside the six-month § 10(b) statute of limitation." Because this defense was not pleaded in the answer or litigated at the hearing, and was not raised until Geske filed its initial brief with me, this defense was not raised in a timely manner and, therefore, was waived. *Public Service Co.*, 312 NLRB 459 (1993); *DTR Industries*, 311 NLRB 833 fn. 1 (1993); *Helnick Corp.*, 301 NLRB 128 (1991). Moreover, even if the March 24, 1992 charge stood alone, it would timely encompass Geske's conduct in maintaining and prosecuting the lawsuit in question since September 24, 1991, which date preceded the last 3 days of the 9-day state court hearing on Geske's September 5, 1991 complaint. In any event, I find that the first charge, which was filed on September 19, is sufficient to support the instant complaint against Geske. See *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959); *NLRB v. Complas Industries*, 714 F.2d 729, 733 (7th Cir. 1983); *Recycle America*, 308 NLRB 50 (1992); *Embassy Suites Resort*, 309 NLRB 1313 (1992).

On the entire record, including the demeanor of the witnesses who testified before me, and after due consideration of the briefs filed by Geske (who also filed a reply brief), counsel for the General Counsel (the General Counsel), and Operating Engineers Local 150, I make the following

FINDINGS OF FACT

I. JURISDICTION

Geske is a Delaware corporation with an office and a place of business in Crystal Lake, Illinois. Geske is engaged in the business of asphalt paving and manufacturing of asphalt mix for sale to commercial customers in the construction industry. During the 12-month period preceding the issuance of the original complaint, Geske's gross revenues exceeded $ 250,000, and Geske purchased and caused to be delivered to its Crystal Lake facility more than $ 50,000 worth of goods and materials directly from States other than Illinois. I find that, as Geske admits, Geske is engaged in commerce

within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

II. THE STATUS OF OPERATING ENGINEERS LOCAL 150 AND TEAMSTERS LOCAL 301

Operating Engineers Local 150 and Teamsters Local 301 are each labor organizations within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[5]

The stock ownership in Geske and Sons, Inc. is equally divided between Larry Geske (Larry) and his brother, Leroy Geske Sr. (Senior). Larry is Geske's vice president and secretary-treasurer. Senior is Geske's vice president. Senior's daughter, Lori Geske (Lori), is the corporation's general manager. Her duties include handling customers' accounts, and she regularly exercises authority to extend credit on the corporation's behalf. The corporation admits that, at all times material, Senior and Lori have been the corporation's agents, acting on its behalf, and are supervisors within the meaning of the Act.

Leroy Geske Jr. (also referred to in the record as Leroy Geske II or III, and referred to herein by his nickname Tigger), is Senior's son and Lori's brother, and is employed by the corporation as a truckdriver. Also in the corporation's employ is Larry's son, Larry Michael Geske (Mike), a truckdriver. In 1991, Tigger and Mike were in their mid-20's.

Lori testified before the state court that Geske employs about 20 employees. Geske's employees include heavy equipment operators, laborers, and truckdrivers. So far as the record shows,

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[5]My findings under this heading are based partly on testimony at the state court hearing. Such testimony is largely corroborated by the testimony before me, and seems unlikely to be disputed.

Geske has never had a bargaining agreement with any labor organization.

B. *The Arrival of Pickets at Geske's Facility on August 10, 1991*

During an undisclosed period which included August 10, 1991,[6] Operating Engineers Local 150 picketed at the premises of a paving company, The Patching People (Patching), with signs which stated, "IOUE Local 150 on Strike Against The Patching People for Recognition as Majority Representative of Company's Operating Engineer Employees." On August 10, Patching's trucks drove from Patching's premises to Geske's facility, in order to pick up materials which Geske had agreed to supply to Patching. Patching's trucks were followed by Operating Engineers Local 150 to the Geske facility, where the pickets remained at the entrance, displaying their signs, while the Patching trucks picked up material.

On September 26, 1991, James A. Smith testified at the state court hearing to the following effect: Together with his father and brothers, he conducts a business as a common carrier under the name of W. Smith Cartage, which before some time in August 1991, had a contractual or business relationship with Geske. Between April 1, 1991, and about August 10, 1991, W. Smith Cartage sporadically delivered sand and gravel to Geske, and on a daily basis delivered to Geske two to four loads of AC-10, a kind of oil which is essential to the making of asphalt. During this period, W. Smith Cartage supplied 100 percent of Geske's needs for AC-10. On August 10, while a driver for W. Smith Cartage was in the process of delivering AC-10 to Geske, James A. Smith was visited by Mike Haffner, who is an officer of Teamsters Local 301. W. Smith Cartage has a collective-bargaining agreement with Teamsters Local 301. Haffner said that a driver for W. Smith Cartage was delivering a load to Geske, and asked James A. Smith to get him out of there. James A. Smith said that he could not do that, because the trailer would be ruined if the AC-10 was permitted to cool off before being unloaded. However, Smith said, he would not send a truck back if there was

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[6]All dates hereafter are 1991, unless otherwise stated.

a problem. Haffner said, "All right . . . we try to help you guys when you need help, and we need help now and you're not trying to help me." Following that conversation, Smith did no further business with Geske.

On September 26, 1991, Mike Geske testified at the state court hearing to the following effect: On August 10, 1991, he observed pickets which followed Patching's trucks when they left Geske's premises, and Kal Lester (Operating Engineers Local 150's business representative) yelled across the road that Geske was "going to be next." On September 13, 1991, Jack Pease testified at the state court hearing to the following effect: He is associated with Pease Construction Company, Spruce Lake Sand and Gravel, and Fox Lake Ready-Mix. About August 10, 1991 (see infra, fn. 8), he was in the area of the Geske plant and went down there "just out of curiosity." He observed Gary Laney and Chuck August (Operating Engineers Local 150's business agents) in the area, and half a dozen pickets, with the signs which named Patching, standing in the roadway 5 to 7 feet apart, when a Performance Paving truck drove up. One of the pickets waved at it to stop; it did so. An unidentified person said that "the plant's broke down." August said, "Geske employees are on strike, why don't you go to Curran?" The Performance Paving truck turned around and left. A minute or two later, an All American truck drove up. August said to the driver that Geske was on strike, "Why don't you go to Curran?" Others standing on the picket line said, "We know where you park your truck in Mundel ein," and lit a cigarette lighter without having a cigarette. A week or so later, on a day when "I'm fairly sure" Geske's name appeared on the picket signs,[7] Pease drove into the plant area ("I was doing kind of a visual inventory of the aggregate products on the ground") and looped back out. Half a dozen pickets were there, and one individual had a cigarette lighter up in the air. Pease purchases asphalt from Geske from time to time, and also testified to various incidents where Local 150 at least allegedly interfered with his own

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[7]The parties before me stipulated that the picketing with signs naming Geske began about August 19.

business but which did not involve Geske, so far as the record shows.[8]

On September 26, 1991, Mike testified before the state trial court that between August 19 and September 17, during a period when Geske was unable to get cartage from other companies, Pease did cartage for Geske.

C. *Events on August 12, 1991*

An affidavit executed by Senior on September 5, 1991, and filed with the state trial court in connection with the lawsuit which is the subject of the complaint before me, states as follows: He had received reports on Saturday, August 10, that on that day, when Patching's trucks arrived, they were followed by pickets from Operating Engineers Local 150 with signs naming Patching. At the end of work on that day, Geske's plant operator, David Schroeder, told Patching that he was going to delay loading Patching's trucks with Geske's material because an anonymous caller had threatened to burn Schroeder's house down. On August 12, a Patching representative telephoned Senior and asked if Geske was going to load Patching's trucks. Senior said that he had called another asphalt company (Palumbo's) to ask if it could take the trucks because Local 150 was "hassling" Geske. Patching's representative said that if Geske would load the trucks that were there, Patching would not come back. About 20 minutes later, Local 150's business agent, Chuck August, telephoned Senior and asked what Geske was going to do with the Patching trucks on Geske's premises. Senior asked whether Palumbo's could take care of Patching. Chuck August said that Patching's trucks could not get loaded at Palumbo's

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[8]Geske's February 1992 brief to the Illinois appellate court contended that the events to which Pease testimonially attached the date of about August 10, 1991, actually occurred on August 19. Geske's brief rested this contention on an at least purported affidavit from Rob Moran (identifying him as All American Asphalt's principal and general manager) which describes similar incidents and "puts these activities on August 19, 1991" (according to Geske's Br. at 11). The purported affidavit, which is attached to that brief, states that such incidents occurred on August 10. Moran (also referred to in the record as Morin) did not testify before either the state court or me.

or any plant in the Chicago area, and asked what Senior was going to do with Patching's trucks. Senior said that he had agreed with Patching that if Geske would load these trucks, Patching would not return to Geske. August said, "Okay, if you load those trucks and that's all, we're out of here."

An affidavit executed by Lori on September 5-6, and filed with the state trial court in connection with the lawsuit which is the subject of the complaint before me, states as follows: After the foregoing conversation between August and Senior, she drove out to the plant and saw Dave Schroeder and Ron Schroeder, whom she described as Geske "employees" who were loader operators, talking with a man whom she did not know. As she came up, everyone got quiet. She asked the unknown man who he was. He reached out his hand, introduced himself as "Chuck August, Local 150," and asked Lori who she was. She told him, went to her car, and took out a videocamera. August started to leave, but she called him and he stopped. She went over to him, turned on the videocamera, and asked what he was doing there that day. He said that he had just stopped by to say hi. She asked him if he knew anything about the "ruckus" there on August 10. He said that he did not know what she was talking about. She asked whether he was telling her that he had not been there. He said that he was not saying that, but that Lori should have been there. She said, "[I]f it happens again I will be." August then walked to his car and drove off; she continued to videotape him until he left. Then, she asked the Schroeders what August had been doing there. They told her that August had said "the Union was pulling out and they did not want to mess with us." She asked what had happened on August 10. Dave Schroeder said that he had received a call from someone who did not identify himself and who said that if Schroeder loaded any more trucks (the only trucks there were Patching trucks) "they would burn his house down." Dave Schroeder told her that on August 10 "there had been cars all over the place, trucks backed up, the police were out there, and one of [Patching's] drivers asked to use telephone to call the sheriff."

On September 12, 1991, Lori testified at the state court trial to the following effect: On August 12, she approached Chuck August,

who was on the premises of Geske's asphalt plant talking to the Schroeders. She had never met August before, and asked who he was. After he introduced himself, she took out her videocamera and he started to leave the property. When she called him by name, he stopped, where upon she turned on her videocamera and asked what he was doing there. He said that he just stopped by to say hi. She asked him if he knew what had happened at the plant on Saturday, August 10. He said that he did not know what she was talking about. She asked whether he was telling her he had not been there. He said, "I am not saying that," and that she should have been there. She told him that "if it happens again I will be."

Lori testified before me to the following effect: When she approached August and the Schroeders on August 12, August asked her who she was, she identified herself and asked who he was, he identified himself and gave her his business card, she walked back to her car, and he left. She testified that after August left, she had a conversation with the Schroeders; but she was not asked about its content and denied following them to any location. See infra, part III,F.[9]

D. *Picketing Directed at Geske Beginning on August 19, 1991; Alleged Events on that Day*

Geske's plant is situated on one side of a dead end road, which is off state Route 14 and is owned by the county conservation

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[9]Some of Lori's testimony summarized in this paragraph appears on p. 313 of the transcript of testimony taken before me. Geske's opening brief states (at 18, fn. 18), "The transcript appears to have erroneously transposed the date on this page alone from August 21 to August 12." Page 313 states that in examining Lori, Geske counsel Smetana stated, "I call your attention to August 12, 1991, which is a Monday;" August 12 was a Monday, but August 21 was a Wednesday. Then, that page states that Lori replied, "On August 12th" to the question of when she first met Chuck August, and that attorney Smetana then asked, "[H]ow did it come that you happened to meet Chuck August on August 12th?" Furthermore, Lori testified during the state court trial that she first met Chuck August on August 12. Page 313 of the transcript in its present form reflects my own recollection of what was said at the hearing. I find that page 313 accurately sets forth what was said at the hearing.

district. Lori testified at the state court trial that the part of the county conservation road which proceeds between Route 14 and the Geske plant is 15 to 20 feet wide, is paved, but has no shoulders except grass. Also fronting on the county conservation road, and across from the Geske plant, is a plant owned by Melahn Construction Company (Melahn). This plant is occupied by Prestress Engineering Corporation, a Melahn subsidiary, which at all material times has been party to collective-bargaining agreements with Operating Engineers Local 150 and Laborers Local 681.

At 4:30 a.m. on August 19, 1991, five or six pickets arrived at the Melahn plant with signs bearing the legend, "I.U.O.E. LOCAL 150 ON STRIKE AGAINST GESKE FOR RECOGNITION AS MAJORITY BARGAINING REPRESENTATIVE OF COMPANY'S OPERATING ENGINEERS."[10] The pickets parked on the premises of Melahn, which had given Operating Engineers Local 150 permission to use Melahn property for this purpose.[11] It is undis

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[10]At the state court trial, Jack Pease testified that on dozens of days between 1989 and March 28, 1990, Local 150 had picketed certain operations with signs stating "J. Pease does not pay the prevailing wage or the area standards," and that these picket lines had been crossed by suppliers, including some unionized suppliers. Pease went on to testify that no unionized suppliers had crossed these picket lines at these locations since, on March 28, 1990, Local 150 put up signs which were identical to those quoted in the text except that Pease was named instead of Geske. Geske's reply brief (at 4 fn. 3) cites this testimony by Pease in attempted support of the assertion that Pease "testified that the Union a year prior had utilized area standards signs and switched to the "ON STRIKE" signs because of the greater effect in successfully turning customers and suppliers away."

[11]My finding that Melahn had given such permission is based on August's uncontradicted testimony. I can find nothing in the record to support the assertion in Geske's reply brief (at 22) that before the filing of the third amended complaint on September 27, 1991, Melahn "had unknowingly allowed its property to be used by Local 150;" the further assertion in Geske's reply brief (at 4 - 5) that Melahn "subsequently agreed with Geske to police its property so that its property would not be used as a platform by other persons to injure Geske;" or Geske's assertion in its opening brief (at 14 fn 14) that Geske dropped Melahn from Geske's third amended complaint "after Melahn learned that Local 150 had been impermissibly picketing on Melahn's property." While not probative of the truth of the report, Lori's affidavit of September 5-6, 1991, in the state court record, that Geske employee Dave Schroeder told her that the pickets had advised him of Melahn's

(continued...)

puted that Operating Engineers Local 150 continued to picket Geske with these signs for at least 30 days thereafter, and that at the very least, Teamsters Local 301 assisted Local 150 in this picketing.[12] The pickets paraded on the roadway, about 20 feet from the entrance to Geske's plant. Some picket signs were planted in the ground on Melahn property and on either side of the entrance to (but not on) Geske's property. An affidavit executed by Lori on September 5-6, 1991, in connection with the state court lawsuit, avers that since August 19, from 6 to 12 pickets had parked at Melahn, usually arriving early in the morning; had stood in the middle of the road and in the paths of Geske customers' trucks; and had shouted to the drivers. On September 25, 1991, Geske driver, Jon Hansen (also spelled "Hanson" in the record) testified at the state court trial that although the pickets sometimes held their hands up "in a stopping fashion," he had invariably driven into and out of the Geske plant without stopping. On September 24, 1991, Tigger testified at the state court trial that various employers do not make deliveries to Geske when pickets are present, and that when picketers are present at the locations of various material production pits, Geske cannot obtain materials. On September 26, 1991, Local 150 Business Representative Chuck August testified at the state court trial that while on the picket line, he and other pickets wrote down the names

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[11](...continued)
permission, indicates that Geske had some reason to suspect that such permission had been granted. Indeed, Geske's third amended verified complaint in the state court proceeding, which added Melahn as a defendant, alleged that about September 11, 1991, Geske notified Melahn that the presence and actions of most of the other defendants were "a tortious interference with [Geske's] contractual relations. Despite this notification . . . Melahn continued to allow" most of the defendants to use its property and facilities.

[12]As discussed infra, the parties are in dispute as to whether unions in addition to Locals 150 and 301 picketed during this period and whether Local 150 stopped picketing after 30 days.

or license plates of customers' and suppliers' trucks which came to the Geske plant, and the date and time of the day of their arrival.[13]

Local 150 Business Representatives Chuck August and Lester testified before me that between 11 a.m. and noon on August 19, 1991, Larry told Geske employee Ron Coss, a truckdriver, that Larry would close the doors before Geske would go union. August testified that on this occasion, Larry had driven up to the plant in a company vehicle consisting of a Bronco which was "multi-colored, frost blue . . . with stripes through it." Larry testified without contradiction that the only blue Bronco owned by Geske is a two-tone blue with a snowplow permanently attached to the bumper, and that during the summer of 1991 it was unused. Larry further testified that the company Bronco which he customarily drives is light green with a beige roof. In view of this testimony about the company Broncos, and for demeanor reasons, I credit Larry's and Coss' denials that this conversation took place.

In an affidavit dated September 5-6, 1991, in connection with the state court trial, Lori stated as follows: On August 19, 1991, she saw a number of cars parked across the road from the Geske plant, with pickets standing in front of them. She "confronted" a couple of the pickets and asked what they were doing there. She videotaped them and their license plates and cars to attempt to identify them. Teamsters Local 301 Business Representative Bud Layoff came over, introduced himself, gave her his card, and said that he had known both Senior (her father) and Larry (her uncle) for years. A few minutes later, Layoff went over to the truck of a customer (Parking Lot Services) that was pulling up to the pickets, and had a conversation, much of which she could not hear, with the driver, who after some hesitation drove in at Lori's encouragement. Lori then asked Layoff what he had said to the driver. Layoff said he had told the driver to go to Curran, that asphalt was 50 cents cheaper at Curran. Layoff went on to say that this was "just one of the tactics we use," and that he had told his "boss," "[I]f you're

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[13]He testified that the pickets made these records in order to assist the Department of Labor in making a prevailing wage investigation.

gonna try to take down Geske's you're gonna have to stay in for the big haul. We're gonna be here for a long time."

On September 12, 1991, Lori testified at the state court trial to the following effect: On August 19, 1991, she met Layoff, for the first time, when she was taking pictures in the road in front of the asphalt plant. He approached her with his business card, and asked who she was. When she identified herself, he said that he had known her father (Senior) and her uncle (Larry) for years, that "they" (inferentially, Teamsters Local 301) were not out there to do any harm, and that he was "just having a good time, having fun." He said that his "boss" had told Layoff to stand there, and that Layoff had told his boss, "If you intend to take down Geske's you're going to be there for a long time." The two continued to converse until the truck of a customer (Parking Lot Services) pulled up, whereupon Layoff walked away and approached the driver. Their conversation "pretty much stopped" after she approached them. She told the driver to drive into the plant, that he did not have to talk to Layoff. After the driver had pulled into the plant, and left with a loaded truck, she asked Layoff what he was telling Geske's customers. Layoff said that he was telling them to go to Curran, a Geske competitor, to get their asphalt; that "that was just a tactic that they use." After August 19, "W. Cartage Company"[14] stopped delivering hot cement to Geske because their drivers, who are represented by Teamsters Local 301, would not cross the picket line.

Bud Layoff, who is the vice president and business agent of Teamsters Local 301, testified before the state trial court on September 25, 1991, to the following effect: On August 19, 1991, he met Lori halfway in the street in front of the Geske plant. He asked who she was. She told him. He gave her his name and business card, and said he had known her family for years. She asked what he was doing there. He said that he was just enjoying life and having a good time. He did not say that he was going to take down Geske, or that he was going to be there a long time if someone was trying to take down Geske. On a couple of occasions,

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[14]She may have been referring to *W. Smith Cartage* (see *supra*, part III,B).

he told "a couple [of drivers] that came through there with Geske's drivers . . . to go to Curran and get it 50 cents a ton cheaper."

On September 24, 1991, Geske driver Ron Coss testified at the state court trial that on August 19 or a few days later, pickets carrying Local 150 signs stopped a Lake Zurich truck and talked to the driver. He was not asked what the driver did after this conversation. On September 13, 1991, Manuel Torres testified in English at the state court trial as follows: He owns Lake Zurich Blacktop Company, a paving company which has been doing business with Geske for 13 years. On August 19, 1991, two Lake Zurich trucks which he had sent to Geske earlier that day to pick up material returned empty. When Torres telephoned Geske plant operator Schroeder to find out why, Schroeder said that Geske was operating but "maybe . . . some people out there in the entrance" had refused to let the Lake Zurich trucker in. Torres thereupon drove his car to the Geske plant, followed by his two Lake Zurich trucks, each of them driven by a driver who could speak no English at all. Someone with a beard, whose name Torres could not remember, told Torres, "Don't go by Geske's, just Curran, because I want to put [Geske] in a strike." Thereafter, Geske loaded both Lake Zurich trucks. On August 23, with Torres' at least implied permission, the bearded man came to Torres' house and asked why Torres did not buy from Curran. Torres said that the last time Curran had quoted a price to Torres, the quoted price was $ 20 a ton, and that Torres was presently paying Geske $ 19 a ton. The bearded man said that Curran was now charging $ 18.50, and again urged Torres to go to Curran. Torres asked how long Curran was going to charge that price. In April 1991, the most recent date on which Torres bought asphalt from Curran, Curran charged $ 20 a ton; and Curran had never advised him that Curran had reduced its price. (At the state court trial, counsel for both Geske and Local 150 identified the man with the beard as Local 150 Business Representative Gary Laney. Laney did not testify before me, but did testify for Geske at the state court trial. He was not asked about this incident.)

Operating Engineers Local 150's business representative, Michael J. Quigley, testified at the state court trial that on August 28, 1991, Curran's superintendent told him that Curran's price for

asphalt was between $ 19 and $ 20, depending on the type of job being bid.

On September 21 and 24, 1991, Tigger testified at the state court trial to the following effect: On August 19, 1991, in the presence of Local 150 Business Agent Chuck August, a white shifted man with a mustache whose identity Tigger did not know waved down an empty Lake Zurich truck which had come to pick up asphalt at the Geske plant and was on Geske property. The white shirted man jogged across the street and jumped on the passenger's side of the truck, which either had stopped (Tigger's initial version) or was moving slowly (his later version), stuck in his head, and talked to the driver. Tigger told the white shirted man to go back across the road. The white shirted man said that the driver wanted to talk to him. Tigger said that the driver did not speak English and did not want to speak to the white shirted man. The white shirted man said that he wanted to talk to the driver. Tigger asked the driver whether he wanted to talk to the white shirted man. The white shirted man called Tigger an obscene name, and walked back across the road. The Lake Zurich driver then picked up asphalt at Geske's facility. Later that day, Lake Zurich trucks drove into the Geske plant and were loaded with asphalt.

On September 23, 1991, John McKelvey testified at the state court trial to the following effect: He is a truckdriver for Geske. On August 19, he saw a picket stand in front of a truck which is owned by Wicks and was about to enter Geske's plant, motion it to stop, and then talk to the driver, who did not turn the truck around. Also on August 19, a truck belonging to Geske customer Knight Paving was asked to stop outside the Geske facility. "A man" talked to the driver, who thereafter came on in. On that same day, McKelvey drove a Geske truck on the premises of Vulcan and Meyer, both of them Geske suppliers (see infra, part III, E, J, P). In each instance, someone thereupon raised a picket sign near the pile of material from which the supplier was to load the Geske truck, whereupon the supplier's personnel refrained from loading the Geske truck. When driving from Vulcan to Meyer, McKelvey noticed that he was being followed by a car, whose driver he could not see because of early

morning darkness, but McKelvey evaded him before reaching Meyer. Thereafter, McKelvey's truck was frequently followed to the job.

E. *Alleged Events about August 20, 1991*

Tigger testified on September 21 and 24, 1991, at the state court trial that on August 20, 1991, Local 301 Business Representative Layoff waved down a Knight Paving truck, which had driven to the entrance of Geske's facility, and went over to talk to the driver, who thereafter drove into Geske's facility. Tigger further testified that he had seen somewhat similar incidents on three or four other occasions, not necessarily involving Knight, during about two of which the picket mounted the running board to talk to the driver. In addition, Tigger testified at the state court trial that on an undisclosed number of occasions, whose dates he was not asked to give, he saw Knight Paving being followed from Geske premises by persons who he believed were associated with the pickets.

The parties to the proceeding before me stipulated that at all times material, Vulcan Materials Company and Geske have had a contract by which Vulcan promised to provide Geske with materials at a certain price, and Geske promised to purchase and pay Vulcan for these materials. On September 26, 1991, James Urbas testified at the state court trial that he is Vulcan's manager of administration for human resources for the midwest division, and that Vulcan is a party to a number of collective-bargaining agreements, including agreements with Operating Engineers Local 150, Laborers Local 681, various other Laborers affiliates, and various Teamsters affiliates. Urbas testified that Vulcan's contract with Local 150 permits union officials access to Vulcan's property for purpose of contract maintenance (but "with a lot of limitations as to what a union official can do and can't do in our pits or our places of business"), but further provides that Vulcan does not have to permit on its property picketing which is contrary to law.

On September 23, 1991, Michael Hurst testified in the state court trial that he is the superintendent of the Crystal Lake sand-gravel operation of Vulcan Materials Company, and that Geske has an

agreement with Vulcan to purchase gravel from its Crystal Lake yard.

On September 24, 1991, Geske driver Coss testified at the state court trial that during the first week of the picketing, when he pulled up at Vulcan's pea gravel pile to get loaded, "two guys in a car" which bore a Local 150 sign came over, whereupon the Vulcan loader said that he could not load Coss' truck.

On September 23, 1991, Tigger testified at the state court trial to the following effect: On August 20, 1991, Local 150 Representative Lester followed Tigger when he was driving a Geske truck to the pea gravel pit at Vulcan's facility. When they arrived, Lester climbed onto the loader, talked to the operator, dismounted the loader, and then took an "on strike against Geske" sign from his car and stationed himself, with the sign, about 5 feet away from Tigger. Although Tigger had placed his truck in a position to be loaded, Vulcan's loader backed out and left. After waiting 5 or 10 minutes, with Lester still standing there holding his sign, Tigger drove out without getting loaded. That same day, Tigger saw another Geske truck, being driven by Geske employee Hansen, at a different pile of pea gravel at Vulcan's facility. Teamster Local 301 Business Agent Layoff was holding an "on strike at Geske" picket sign, and Hansen did not get loaded. When Tigger drove back from Vulcan's facility to Geske's shop, he was followed by Lester, who continued to drive along the road after Tigger pulled into the shop.

On September 12, 1991, Lori testified at the state court trial to the following effect: About August 20, 1991, she and Tigger drove in a Geske truck, and Geske employee Hansen drove another Geske truck, from the Geske plant to Vulcan's facility. These trucks were followed from the Geske plant by a car or cars. When the Geske trucks arrived at Vulcan, an individual who was in a following car leaned a "Strike" sign upside down against his car, climbed up on the loader, said something to the loader operator, and came back down, whereupon the loader operator turned off his loader and would not load the trucks. The Geske trucks were not loaded at

Vulcan.[15] Thereafter, Vulcan tried to deliver to Geske, but Vulcan's truckers would not cross the picket line. Since August 20, 1991, Geske had done no business with Vulcan, which was Geske's principal supplier of aggregate and with which Geske has done business for years. Also on August 20, "W. Cartage Company," [16] with which Geske had a regular agreement to supply Geske with hot asphalt, ceased bringing such hot asphalt because their drivers, who are represented by Teamsters Local 301, refused to cross the picket line at Geske. On and after August 20, five or six cars belonging to "congregants who are part of the picketing group" have been parked near the Geske facility and following Geske's trucks.

On September 25, 1991, Geske truckdriver, Hansen, testified at the state court trial to the following effect: About August 20, 1991, he drove an empty semi, bearing Geske's name, from Geske's facility. He was followed at a 5-foot distance by a car occupied by Teamsters Local 301 Business Agent Layoff. When Hansen pulled up to a pea gravel pile at the Vulcan facility, about 1-1/2 miles from Geske's facility, the car which had been following him pulled up next to Hansen's semi. Layoff grabbed a "strike" picket sign, and stood next to the driver's-side door with his hands resting on top of the sign. Vulcan's loaders in the area failed to follow the practice, which they usually followed when Hansen drove an empty truck near the pea gravel pile, of coming over and loading the truck. While Layoff was standing next to the cab, Hansen asked him "what they were doing;" Layoff replied that "they were organizing." Hansen further testified that at that same time, Tigger had driven another Geske truck to another pea gravel pile at Vulcan, that someone was holding a "strike" sign near Tigger, and that the Vulcan loader pulled up to load Tigger but left after being addressed by the man holding the sign. Layoff stayed at Vulcan's premises when Hansen left.

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[15]An affidavit signed by Lori on September 5 and 6 in connection with the state court proceedings describes this or a similar incident. Her affidavit describes a conversation, outside of her hearing, between Layoff and the picket while these events were going on.

[16]See supra, fn. 14.

On September 26, 1991, Mike Geske testified before the state trial court that on either August 20 or 21, when an empty Performance Paving truck approached Geske's facility to buy asphalt from Geske, Local 150 Business Representative Lester held a picket sign at the right front fender, whereupon the truck left without purchasing asphalt from Geske. According to Mike, Local 150 Business Representative Chuck August and Local 301 Business Representatives Layoff and Haffner were present on this occasion. Mike further testified that after that day, Performance Paving continued to be a regular customer of Geske while picketing was going on.

On September 24, 1991, Geske truckdriver Coss testified at the state court trial that on five or six occasions since August 19, he had been followed when he drove a Geske truck from Geske's facility. Coss testified that on August 20, Laborers Local 1035 Business Agent Gerald Bauman (also referred to in the record as Bowman, Baumann, and Rowman) followed him "pretty close" and "pretty fast" in a black pickup truck on a 10-minute drive to the Crystal Lake High School job, where Bauman parked his truck.

F. *Events on August 21, 1991*

At 4:30 or 4:45 a.m. on August 21, 1991, Operating Engineers Local 150 Business Representative Chuck August came down to the picket line at Geske, made breakfast on the picket line, and shared it with some of Geske's employees. At about 9:15 a.m., while he was talking to what August testimonially referred to as two Geske "employees" (see infra, fn. 18) at the entrance to the plant, someone from the other side of the road said, "[H]ere she comes." The employees to whom August was talking ran away from him. Lori pulled in, stopped the two employees (calling back one who was still trying to get away), pointed her finger at them, and said that she did not want them talking to August. She further said, "I want to know if you sign" followed by something else which August did not hear. Then, she looked over, saw that August was looking at the group, and said something he did not hear.

About 10 or 15 minutes later, she came into view of the entranceway, near which August was still standing. She came up to

him and "demanded to know" if any of the employees signed anything with August. He said that it was not her privilege to know. She said that she had directed the employees not to even talk to August.[17] n17 She said that August had no right to be there, and told him to "get out of here." August said that he had every right to be there, and told her that if there were any problems at all on the picket line, even foul language, he would like to know about it and would get it corrected. He wrote his home phone number, beeper number, and car number on one of his business cards, which show his business number, and gave the card to Lori. She took the card, told him to get out of there, and started walking back to her car. August walked across the street to the other picketers. She came back over, took one of the picket signs out of the ground, threw it across the street, got back into her car, and drove away. The picket sign in question was not on Geske property. After she left, August put it back at the place from which she had removed it.[18]

G. *Alleged Events on August 22, 1991*

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[17]Because Lori was admittedly Geske's agent and supervisor, I find no merit in Geske's contention (reply Br. 24) that her statement in this respect (to which August credibly testified) was hearsay. Oklahoma Installation Co., 309 NLRB 776, 779 (1992). In any event, Geske's failure to raise this objection at the time August gave this testimony forecloses such an objection now. *American Rubber Co. v. NLRB*, 214 F.2d 47, 52-53 (7th Cir. 1954); *Today's Man*, 263 NLRB 332 (1982); *Advance Transportation Co.*, 300 NLRB 567, 572 fla. 7 (1990), *enfd.* 979 F.2d 569 (7th Cir. 1992).

[18]My findings about this incident are based on Chuck August's credible testimony before me. Lori testified before me that on that day, August 21, in Chuck August's presence, she took out of the ground a picket sign which was on Geske property. She further testified that it was August 12 and not thereafter when Chuck August gave her a business card, that during this conversation Geske's personnel Dave and Ron Schroeder (whom in a prior affidavit she had described as "employees" who were "loader/operators") were present, that she had no conversation with the Schroeders on August 21 in which she asked them whether they had signed anything, that on August 21 she did not tell Chuck August he had no right to be there, and that she never demanded from Chuck August or any other Business Representative of Local 150 whether any Geske employees had signed with the union; see supra, part III, C. For demeanor reasons, I credit August.

1. Mike Geske and the picket sign

As previously noted, Mike Geske is Larry's son. Mike is employed by Geske as a truckdriver. On August 22, 1991, he stopped his truck at the entrance to Geske's plant, got out, and kicked over a Local 150 picket sign that was stuck in the ground near the plant entranceway but on conservation district property. After unsuccessfully trying to break it, he put it into his cab and drove it into the yard. Local 150 Business Representative August walked over to the entranceway waiting for Mike to come back out so August could retrieve the sign. After dumping the load, Mike drove out the entranceway. Then, August asked Mike to return the sign. Mike said that he had no use for the sign. August said that he wanted the sign back. Then, August told Geske employee Ron Coss, who had been observing the entire incident, that August was going to have to get the sign back from Mike. August went on to say to Mike, "[Y]ou don't have to put a scene on for your employees . . . just do yours and we'll do ours." Mike told August to keep the signs on his own side of the road. August said that Mike did not own that side of the road, and that the signs were on conservation district property. Mike returned the sign to August. As the truck was pulling out, Mike raised his middle finger.

The General Counsel adduced the foregoing evidence to support her contention that Geske filed and maintained the state court lawsuit with a retaliatory motive. I discuss infra, part III, V, 2 Geske's contention that Mike Geske's conduct is nonprobative of such a motive because he allegedly is not an agent of Geske.

2. Alleged following of Mike Geske by Local 301 Business Agent Layoff

On September 26, 1991, Mike Geske testified at the state court trial that on August 22, Local 301 Business Agent Layoff followed Mike's semi from the Geske asphalt plant part of the way to the Charles Lee gravel pit in Belvidere, where Mike picked up a load of chips. Before the picketing began, Geske had usually bought its chips at Vulcan, which is 25 miles closer than Lee to Geske's

facility but whose employees were refusing to cross a picket line or work beside a picket sign.

3. Alleged following of Tigger by Local 150 Business Agent Quigley

On September 24, 1991, Tigger testified at the state court trial to the following effect: On August 22, 1991, he drove a Geske truck from the Geske facility headed for the Charles Lee gravel pit in Belvidere. His testimony suggests that Lori accompanied him in the truck, but this is unclear. Tigger was followed by Local 150 Business Representative Mike Quigley. When Tigger reached the town of Marengo, which lies between the Geske facility and Belvidere, he pulled over onto the shoulder of the road, whereupon Quigley passed him, made a left turn into a parking lot across the road, and parked his car there. Then, a Marengo policeman came over to Tigger's truck; Tigger's initial testimony suggests that the policeman came over at the request of Lori and Tigger, but he later testified that the policeman came over because he saw Lori and Tigger taking photographs. Upon seeing the policeman approach Tigger, Quigley walked over and introduced himself as a representative of Local 150. Tigger said Quigley was following him. Quigley said that this was true, and that "[w]e are on strike against Geske's. If we are following, we are simply going to cut them off . . . We are on strike against Geske." Lori said that "it was an illegal strike." Quigley said that it was a legally sanctioned strike. The policeman said that Quigley could follow Tigger; that Tigger should let the policeman know if Quigley gave him any traffic problems; but that there was nothing the policeman could do about Quigley's following Tigger. When Tigger resumed his journey, Quigley followed him into Belvidere, and directed an obscene gesture to Tigger before turning away.

Lori testified before both the state court and me, but was not asked about this alleged incident. On September 26, at the state court trial, Quigley denied following Geske trucks, denied following a Geske truck to Belvidere, denied that he was stopped by the police, and that a police report was made while he was following the truck. Neither Tigger nor Quigley testified before me.

H. *Geske's Initial Unfair Labor Practice Charges Against Operating Engineers Local 150 and Teamsters Local 301*

On August 23, 1991, Geske, through Lori, filed three charges against Operating Engineers Local 150 and one charge against Teamsters Local 301. The charge against Local 301 (Case 33-CC--1053) alleged that Local 301 had violated Section 8(b)(4)(i) and (ii)(B) of the Act since about August 10, 1991, in that

> Local 301 has through picketing and threats, coerced and restrained [Patching], Geske & Sons, Inc., Geske's customers, acting in concert with Op. Engineers 150 . . . where in each case, their object is to put pressure on Geske or customers of Geske to stop doing business with Geske, or change the way they do business with Geske through direct threats to persons in commerce and through picketing with an untruthful sign, the signal effect of which is to falsely cause employees of neutrals to believe that the Union is on "strike" when in fact, the Union does not represent any employees of Geske and has never represented any employees of Geske. By these and other acts, [Local 301] has violated Section 8(b)(4)(i) & (ii)(B).

One of the charges filed by Geske that day against Operating Engineers Local 150 is virtually identical to the above-quoted charge, except that the respective references to the two locals are interchanged. Another charge filed by Geske against Operating Engineers Local 150 on that day (Case 33-CC-1054-2) alleged that since about August 10, 1991, Local 150 had violated Section 8(b)(4)(i) and (ii)(A) in that Local 150 "threatened and coerced [Geske] through picketing and threats where an object was to force or require Geske to enter into an agreement [prohibited] by Section 8(b)(4)(i) & (ii)(A)." A third charge filed by Geske that day against Operating Engineers Local 150 (Case 33-CE-18) alleged that about August 12, 1991, Local 150 "entered into an agreement prohibited by Section 8(e) with Geske and Sons, Inc. and entered into similar agreements with other employers in the last six months to change the way they do business or stop doing business with [Patching]. By these and other acts, [Local 150] has violated Section 8(e)."

I. *Alleged Events on August 26, 1991*

1. The alleged city of Crystal Lake incidents

On September 26, 1991, Mike Geske testified at the state court trial that on August 26, when Geske was performing a paving job for the city of Crystal Lake, Laborers Local 1035 Business Representatives Bauman and Monroe Smith Jr., and Local 150 Business Representative Angel Delrivero, pulled up at the job and repeatedly repositioned their cars so that they were always where Mike was operating the paver. Mike further testified that Delrivero took pictures of Geske personnel with a videocamera; and that when trucks entered or left, all three union representatives wrote on legal pads. Mike went on to testify that when he moved his paver that day to the next job, Local 1035 Business Representative Bauman followed him there by truck.

On September 23, 1991, McKelvey testified at the state court hearing to the following effect: On August 26, 1991, Bauman followed McKelvey when he drove his Geske truck from the Geske facility to a paving job in Crystal Lake. When McKelvey reached the jobsite at about 8 a.m., he found that Local 1035 representatives Bauman (who was writing something down) and Smith, and someone whom McKelvey identified as "Angel," were there. McKelvey further testified that on a date he could not recall, "Angel" followed one of Geske's trucks to the "Wicks" or "Wicker" subdivision, and then pulled over and sat there the rest of the afternoon, "moving from street to street, right along with us," and writing something down. Also, McKelvey testified that on several other occasions during a period when Local 150's signs were up, Bauman followed him at a normal distance.

Robert Bergstrom testified at the state court hearing on September 23, 1991, to the following effect: Until August 26, 1991, his employer, Wicks Blacktop, was a Geske customer. On that day, he and Bob Moran, who is Wicks' owner, drove a truck to the Geske plant to pick up some asphalt. When the Wicks truck reached the entrance to Geske's plant, Bergstrom saw about eight men standing on the other side of the road watching the Wicks truck. As

the truck was making its turn into the Geske plant, Operating Engineers Local 150 Business Representative Chuck August, who was the only individual standing on that side of the road, stepped in front of the truck on the driver's side, held up his arm to stop the truck, and said, "We are on strike here" (Bergstrom's initial version) or that "he was on strike" (Bergstrom's version on cross-examination). Moran asked, "Do you own the plant?" (Bergstrom's initial version) or who owned the plant (Bergstrom's later version). August said, "We do. The operators own the plant," and wanted to be in the union. He went on to say that Wicks should go to Curran (Also spelled "Kern" in the record) and, in response to a question from Bergstrom or (more likely) Moran, said that Currran would take Wicks' checks and give it credit. The Wicks truck drove into the Geske plant, picked up 4 tons of asphalt, and drove out of the plant without stopping. So far as Bergstrom knew, Wicks had not thereafter done any work with Geske. Price is a factor in deciding to buy asphalt, and all the plants, like Curran and Geske, have about the same price.

August testified before me that on this occasion, "Quite possibly, I could have" stated, "We're on strike here." Also, he testified before me that "I believe I did" say to drivers who approached the picket line that "[t]he operators here want to go union." He further testified before me that on occasion, when drivers who wanted to honor the picket line at Geske asked if there was a place nearby where they could get asphalt, he suggested that they go to Curran, which was the closest asphalt plant, and "Rick" would set them up.

2. The alleged incident involving the ridge

On September 24, 1991, Tigger testified before the state trial court to the following effect: On August 26, Tigger parked a Geske truck on the road in front of Geske property and took from inside the truck photographs of various persons whom he believed to be associated with Local 150 and who were on a ridge which he believed was owned by Geske and which is about 250 feet behind a conveyor which goes up to Geske's asphalt plant. After taking these photographs, he was approached by Chuck August, whom

Tigger told to keep "his guys" off the ridge. August said that he thought these men were on the property of an adjacent landowner, Jimmy Veugeler, who had given them permission to be present. Tigger said that these men had been on Geske's property, not Veugeler's; said that Tigger would call the police if he saw them on the ridge again; and further said that he would check with Veugeler to see if they had permission to be on Veugeler's property. August told Tigger to go ahead, and asked who Tigger was, but Tigger did not tell him. August introduced himself and gave his card to Tigger. Tigger went on to testify that August "told me I wouldn't have to worry about my mother or my sister . . . he didn't want to hurt us."

J. *Alleged Events on August 27 and 28, 1991*

Monroe Smith Jr. testified at the state court trial on September 23, 1991, to the following effect: He is employed by Laborers Local 1035, which is a member of the McHenry County Building Trades Council. The other members of the McHenry Council include Operating Engineers Local 150 (whose delegate to the Council is Chuck August), Teamsters Local 301 (whose delegates to the Council are Layoff and Haffner), and Electricians Local 701. At a meeting of that Council (to which Smith is a delegate from Laborers Local 1035) in the morning of August 27, 1991, it was mentioned that a picket had been set up at Geske. Later that same day, Smith went to the Geske facility to see what was happening. When he did so, he saw August, Layoff, Haffner, and 9 to 11 unidentified persons from the "electricians," the "painters," and other unions; all of these individuals had attended the Council meeting earlier that day.

On September 26, 1991, Mike Geske testified at the state court trial that on August 27 or 28, in the presence of Chuck August, Mike and Tigger asked Local 301 Business Representative Layoff "what business it was of his to shut us off on material at Vulcan or interfere with our ability to obtain materials," to which Layoff replied, "Well, my boss told me to go out here and support 150."

On September 21 and 24, 1991, Tigger testified at the state court trial to the following effect: On August 28 or 29, Local 150 Business Agent Mike Quigley drove his car, which had been parked

at Melahn's, to a point about 30 feet in front of a truck which was owned by Lyman Martin Cartage Company and was on the conservation district road with a load of chips for Geske from Vulcan. Quigley parked his car alongside the truck but facing in the opposite direction, got out, talked to the truckdriver, and then drove back to the Melahn property. The Lyman Martin driver turned around, went to the end of the road, talked on his radio, and then headed back toward Route 14 without making a delivery.

On September 23, 1991, Allen R. Miller testified before the state trial court to the following effect: Miller is aggregate manager for Meyer Material Company (Meyer) which sells materials, including pea gravel, which are used in making asphalt. On August 28, 1991, three Geske trucks came to the Meyer facility to purchase and pick up pea gravel. At about 7 a.m., after the Geske drivers had loaded two of the trucks, Teamsters Local 301 Business Representative Haffner put up a "roving picket" and told Miller that if Meyer continued to load Geske trucks, Haffner would put up a picket at Meyer's only front gate and picket Meyer's entire operation. In consequence of this conversation, Geske's third truck drove off without being loaded, and Miller told Haffner that Meyer would not load any further Geske trucks from Meyer's pea gravel hopper. Approximately 15 or 20 minutes later, while Haffner was standing next to Miller, an unnamed individual approached Miller with the representation that he was a representative of Local 150; there is no other evidence that he was such a representative. Miller stated that in the future, Geske trucks would not be loaded from Meyer's pea gravel hopper, whereupon the unnamed individual said "Okay" and left. Between that date and the date Miller testified, Meyer had not to Miller's knowledge loaded Geske with any further products.[19]

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[19]The record before me contains an "amended affidavit," executed by Miller, which makes much the same assertions as his testimony; this "amended affidavit" was executed on September 10, 1991, several days after Judge Haskell Pitluck issued the temporary restraining order on September 5, 1991. The record before me also contains a photocopy of an unsigned document captioned "Affidavit of Allen Miller;" this document calls for a notary's signature on an unspecified date in September 1991. Company counsel Avakian stated on the record that the original copy of the latter document (which is consistent with Miller's testimony) was in

(continued...)

K. *Events on August 29, 1991*

Arrangements for a conference on August 29, 1991, were confirmed by Operating Engineers Local 150 Business Representative Chuck August with Senior, who requested that it be held in the evening when he finished work, at 7 or 7:30 p.m. At 7 p.m., August and Teamsters Local 301 Representative Layoff went to Geske's yard (4 or 5 miles from the plant), where they were met by Lori, Tigger, and Mike. The Geskes ushered August and Layoff into a coffee room, and asked why they were there. August said that they were there for a meeting with Senior.

August credibly testified before me to the following effect: "[T]hey said, no, you have to meet with us. You're dealing with us. I said, [we] would like to wait for [Senior]. Lori told me that we had to meet with them." August said that he and Layoff would not talk about the matter until Senior arrived. Then, Lori told them to leave. They left the building and went to stand by their cars, which were parked in Geske's parking lot. After the two business agents had stood there for about 10 minutes, waiting for Senior, "Lori, Mike and Tigger came out to us, approached us. And they said, you have to deal with us. My father is not going to be here. You have to deal with us." August said that he had thought Senior was going to attend the meeting. "They" said that "you" had no right to be out there to picket. August "said, yes we do. We have every right.

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[19](...continued)
fact signed on September 5, a representation which was accepted by counsel for the charging party but not by the General Counsel. Avakian also stated that the state trial court probably still had this at least alleged September 10 document under seal. Company counsel Smetana stated to the state trial court on September 20, 1991, that "The affidavit under seal is the affidavit that shows the emergency need why the TRO had to be issued at that time [and] indicates the nature of what happened in terms of the one supplier that was still able to supply [Geske] and the threats that were visited upon that supplier by the Defendants herein." On September 23, 1991, after Miller had testified, Smetana permitted counsel for Locals 150 and 301 to examine the affidavit by Miller which was under seal. During a subsequent colloquy, Judge Sullivan stated, in effect, that the affidavit referred to by Smetana was the alleged September 5 "affidavit," and that both Miller "affidavits" were in court files as if they had both been received under seal.

They said, why are you doing this to us. I said, because we have the right to go after recognitional picketing." Lori asked August and Layoff, "are you proud of what you do?" August said that he was, that he was proud of trying to provide a wage and benefits for the working man. Then, she asked Layoff, "how can your children be proud of what you do?"[20] The record fails to show Layoff's reply, if any. Tigger asked August what "we" could do to get this resolved. August said that he had to talk to Senior. Tigger said that Senior was telling "us" to handle it, and asked "what if we gave everybody raises?" August said that this would be a step in the right direction. Tigger asked whether raises would take the pickets down. August said that he needed to talk to Senior. Tigger said, "we know who the worthless buttholes are that brought the union in."[21] After some further discussion between August and Tigger, August suggested that they move away from Mike, Lori, and Layoff, the heated conversation between whom was getting louder. After August and Tigger moved away, Tigger again asked what it was going to take to get the picket signs down. August said that he had to talk with Senior, and that Senior had promised in Tigger's presence to attend the meeting. Tigger said that "those worthless buttholes are going to get theirs."[22] Lori then walked over and told August to leave. He said that he was waiting for Senior, that Senior had told August to be there. She said four or five times that August had to leave "now." Tigger told her to go into the shop, and told August that Tigger was going to talk to Senior and try to set up another meeting. Geske's employees at the yard were in full view

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[20]Lori's and Layoff's children attended the same school.

[21]At the state court trial, Tigger, who did not testify before me, in effect denied so describing union representatives. I regard this cold record as insufficient to warrant discrediting August's testimony before me about Tigger's language, buttressed as such testimony is by August's demeanor.

[22]See *supra*, fn. 21.

of these events, but the record fails to show what, if anything, they could hear.[23]

L. *Alleged Events About September 1, 1991*

On September 24, 1991, Tigger testified to the following effect: About September 1, Chuck August jogged across the road to a Tim's Excavating truck, which had stepped on the road with its front pointed toward Geske's plant; stepped up on the passenger's side of the truck; and stayed there about 2 minutes. Then, the truckdriver drove into Geske's property, drove over to Tigger, and asked whether Geske's plant was open, to which Tigger replied yes. The truck thereupon drove up to get loaded.

M. *Alleged Events About September 4, 1991*

On September 25, 1991, Jon Hansen testified at the state court hearing to the following effect: Hansen is employed by Geske as a truckdriver. About September 4, 1991, when he drove an empty Geske truck from Geske's premises to get a load of goods from the Charles Lee gravel pit about 40 miles from Geske's facility, Local 150 Business Representative Delrivero followed Hansen at a distance which varied from 2 to 10 feet. When Hansen stopped in the Lee pit, Delrivero stopped at a point about 50 yards from Hansen and at least 250 yards inside the entrance and pulled out an Operating Engineers Local 150 picket sign. Delrivero left Lee's premises when directed to do so by Lee representatives who told him he was trespassing. On about the same date, Hansen saw a Geske customer, Parking Lot Service, being followed by a car about 10 feet behind Parking Lot and with a license plate stating "Haffner;" as previously noted, one of Teamster Local 301's business representatives is named Mike Haffner.

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[23]Lori testified that after August asked to talk to Senior, she replied that Senior "wasn't going to be able to make it. And he was welcome to talk to us, Mike and [Tigger] and myself were present." She denied demanding at that point that August leave. For demeanor reasons, I credit August.

On September 26, 1991, Mike Geske testified at the state court trial that on September 4 or 5, Local 150 Business Agent Bill Rucker followed him by car, at a distance of 30 feet, when Mike drove a semi loaded with asphalt from the asphalt plant to a Geske paving job.

N. *Geske's Initiation of the Lawsuit on September 5, 1991*

On September 5, 1991, Geske commenced a lawsuit in the Circuit Court of McHenry County, Illinois, County Department, Chancery Division, against Operating Engineers Local 150 and Teamsters Local 301. The original complaint was signed by attorneys Samuel J. Diamond, whose office is in McHenry, Illinois, and Gerard C. Smetana, whose office is in Chicago, Illinois. A copy of the original complaint, which is 11 pages long, was served on Local 150's counsel at his office in Chicago at 4:50 p.m. on September 5.[24] Attached to this complaint were the affidavits by Lori and Senior summarized supra (part III,C,D), and an affidavit by Miller (see supra, fn. 19). The proceeding was held about 70 miles from Chicago, and neither Local 150 nor Local 301 was represented by counsel. Just before the proceeding began, Geske counsel made certain handwritten changes in the original complaint.[25] In addition, the heading, which in typewritten form stated "Verified Complaint for Temporary Restraining Order, Preliminary and Permanent

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[24]Smetana's certificate of service attached to the complaint avers that it was served by messenger before 5 p.m. on September 5 on counsel associated with Baum and Sigman, Ltd., and on counsel affiliated with Carmell, Charone, Widmere, Matthews & Moss. Both firms are listed as having a Chicago address.

[25]Among other things, these handwritten changes altered par. 18 by withdrawing the allegation that Local 150 had threatened to boycott Lake Zurich Blacktop if it continued to do business with Geske, by adding the allegation that Local 150 had threatened to damage the property of the "John Doe Co." if it continued to do business with Geske, and by adding the name of All American Asphalt as an employer whose employees had allegedly been blocked by Local 150 from entering Geske's facility to buy asphalt. In addition, a sentence which in its original form alleged that "Lake Zurich Blacktop, previously one of Geske's biggest customers, has not returned since," was changed to read, "Performance Paving, and American Asphalt, previously one of Geske's regular customers, have not returned since." Performance Paving is not elsewhere named in the pleading.

Injunctions, and Damages," was amended by inserting a handwritten "Amended" after the word "Verified." This complaint as amended included allegations that Locals 150 and 301 had engaged in trade libel against Geske, and tortious interference with Geske's contractual relations and prospective advantage, in connection with incidents involving Patching, Lake Zurich Blacktop, All-American Asphalt Maintenance, Tim's Excavating Company, Performance Paving, and Charles Lee & Sons. The complaint sought "judgment against Defendants in an amount to be proved at trial, together with the costs of this lawsuit, attorneys' fees, and such other relief as this Court deems just and proper." Also on September 5, Geske counsel filed with the state court, and inferentially served on Local 150's counsel along with the original complaint, a document captioned "Plaintiff's Motion for Temporary Restraining Order and Preliminary and Permanent Injunction." At 6:58 p.m. on September 5, Circuit Court Judge Haskell Pitluck issued a temporary restraining order, which was drafted by Geske's counsel and was to expire by its terms at noon on Monday, September 16. The order enjoined Operating Engineers Local 150 and Teamsters Local 301 from "(1) physically blocking ingress and egress of [Geske's] employees, customers and suppliers to and from [Geske's] facility; (2) threatening [Geske's] employees, customers and suppliers; (3) publishing false and misleading statements, oral or written, about [Geske] to [Geske's] employees, customers and suppliers and to the public at large, including but not limited to placards, signs or statements stating that the employees of [Geske] are on strike; and (4) otherwise interfering with the contractual relationships between [Geske] and its customers and suppliers." Pursuant to Geske's request, bond was waived.[26]

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[26]In connection with the absence of counsel for Locals 150 and 301 during the ex parte proceeding which led to the temporary restraining order, Geske's Chicago counsel Smetana stated to the state trial court, inter alia, that "when I came here at the close of the business day, the papers had been filed by [Geske's McHenry counsel]. We were not sure when or where we would be heard, and we waited for Judge Pitluck until 7 p.m. At that point it was still not clear whether we were going to be heard. At that point it was impractical" to call union counsel; "it is not possible to get through to those offices at that hour. We had done everything possible to notify them."

An affidavit signed by Senior on September 5, 1991, in connection with the state court lawsuit avers that since the picketing began, none of Geske's employees had refused to report to work. So far as the record shows, all of Geske's employees have continued to report to work at all material times.

O. *Alleged Events on September 6, 1991*

On September 6, an individual referred to in the record as Saws or Schaltz, who is a process server or is connected with the McHenry Country sheriff's department, came to Lori's office, which is far enough from the Geske plant to make driving between them convenient,[27] and stated that he had papers to serve on August. Lori said that August was at the picket line. She drove her car to the picket line, and Saws followed in his car. When they reached the plant, Saws gave August, who was standing at the entrance to the property, a "packet of paperwork" which included a copy of the temporary restraining order issued by Judge Pitluck on September 5. As soon as August received the packet, Lori demanded of August that he take down all the pickets, remove himself from where he was positioned, remove all the pickets, and leave right then and there. August said no, that he had time to respond to it, and that he did not even know what he was looking at. Saws agreed that August had time to respond. Lori demanded that Saws remove the pickets and have August and the pickets arrested. Saws said that he had no authority to do that. Lori reiterated that the picket signs had to be taken down "now, not in ten minutes, now." Saws walked back over, and had a 5- or 10-minute conversation with Lori, whose content is not shown by the record. Then, he left the area. Lori left a few minutes later. As previously noted, the picket signs stated, "LOCAL 150 ON STRIKE AGAINST GESKE FOR RECOGNITION AS

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[27]Her September 5 and 6 affidavit states that these two locations are "a couple of miles" apart.

MAJORITY BARGAINING REPRESENTATIVE OF COMPANY'S OPERATING ENGINEER EMPLOYEES."[28]

On September 12, 1991, Lori testified at the state court trial to the following effect: She saw the process server serve August. The process server "then returned to our plant" and notified "me" that August had been served. After August was served, he left the plant picket line. She stayed for "quite a while." August returned later that day reading the order, with his reading glasses on, and read it to himself "for quite a long time."[29]

An affidavit by Lori dated September 6, 1991, and submitted in connection with Geske's motion that day to amend the temporary restraining order and for sanctions for failing to follow it (see infra, part III,S), avers, inter alia, that in an area opposite Geske's plant, "One car which has license plates 'Scabby' has an inflatable rat on its roof, the sides of the car read 'Local 150 Rat Patrol.' Suppliers and customers are intimidated by this [and other] activity and many are refusing to cross." On September 12, 1991, she testified at the state court trial that such a car, with an inflatable rat about 5 feet high and 5 feet wide, had parked on Melahn property since September 6, and that she had seen the car being driven by Local 150 Business Agents August and Delrivero. Geske driver Hansen testified before the state court on September 25 to having seen this "Ratmobile" vehicle during an undisclosed period between August 19 and September 18. On September 29, 1991, Tigger testified at the state trial, in effect, that the "Local 150 rat patrol car" was parked on Melahn's premises on September 6.

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[28]My findings as to the conversation in front of the plant on this day are based on August's testimony. For demeanor reasons, I do not credit Lori's testimony that she was 50 feet away from the Saws-August conversation and could not hear any of it, or her denial that she asked Saws for August's arrest or demanded that August take the pickets down. She was not asked about her conversation with Saws in August's sight but not earshot.

[29]The copy of this order which is in the record before me is handwritten, contains crossouts and corrections, and is difficult to read.

P. *Events on September 7, 1991, at Vulcan's Premises*

On September 23, 1991, Tigger testified at the state court trial that on September 7, 1991, he and Geske driver Hansen each drove a Geske truck to Vulcan's establishment. According to Tigger, he gave a copy of the September 5 restraining order to one "Al," who runs Vulcan's scale house. Tigger went on to testify that "Al" made a copy of the order and said that Geske "could go get loaded . . . it's not up to him." Tigger further testified that he and Hansen backed up their respective trucks to Vulcan's pea gravel pile, where they waited for Vulcan loader Ken Powers to finish some other loading jobs and come over to load the two Geske trucks. Tigger went on to testify that Local 150 Business Representative Lester and "the big Mexican guy" had been sitting in a car about 75 feet away, but moved the car to about 30 feet from the pile. Tigger testified that when Powers drove Vulcan's loader over to the pea gravel pile and filled a bucket with gravel, Lester and the "big Mexican guy" got out of the car and, with a picket sign, went over to stand in front of Geske's trucks; Lester shook his head at Powers; and Powers thereupon dumped his bucket of gravel back into the pile and failed to load Geske's trucks. Tigger did not testify before me. Mike Geske, who according to Tigger took certain photographs of the incident, testified for Geske before the state court, but not before me; Mike was not asked about this incident. Hansen testified for Geske before the state court and before me, but was not asked about this incident.

Lester and Powers testified before me; and Lester's prehear ing affidavit was received into evidence, on Geske's motion, without objection or limitation. I see no significant inconsistencies between his testimony and his affidavit; moreover, although he and Powers testified to certain conversations involving Tigger to which Tigger's testimony did not refer, Lester's and Powers' version of the events is consistent with Tigger's version. A composite of Lester's and Powers' credible testimony and Lester's affidavit shows as follows.

At about 6:30 or 7 a.m., Powers, who was working on Vulcan's loader, heard Vulcan's dispatcher say, on a citizens' band radio installed on the loader, that two Geske trucks were heading towards

Vulcan's yard with a court order. This message was also picked up by a citizens' band radio in Lester's car, in which he and Business Agent Rolando Jaimes[30] were parked on Vulcan's property. A minute or so later, at about 7 a.m., two Geske semis -- one driven by Tigger and the other by Hansen -- arrived at the Vulcan yard, along with a pickup truck being driven by Mike; Lori may have been a passenger in one of these three vehicles. The semis backed into a materials pile in a position to receive materials. Powers proceeded to the materials pile and loaded a bucket of his loader. Meanwhile, on seeing Powers' machine approach the materials pile, Lester drove to a point near the pile, and Jaimes exited Lester's car with a picket sign in hand and proceeded to the front of the Geske semis, in full view of Powers. When Powers (a member of Operating Engineers Local 150) approached the Geske truck and read the sign, he stopped his equipment, emptied the bucket back onto the pile, and backed his equipment away, whereupon Tigger got out of his truck, waved two pieces of paper at Powers, and started to yell at him. Then, Tigger climbed into the cab of Powers' loader, showed Powers the paper, and yelled, "[Y]ou have to load us now . . . I have this court order and you're supposed to load me. It says you have to load me." Lester waved Powers down from the loader. Powers, who up to that point had said nothing to Tigger, asked to see Powers' business agent. Tigger said, "OK," whereupon Powers parked the loader, from which he and Tigger descended. Mike, who was operating another Geske truck in the area, and Tigger told Powers that the two papers were restraining orders and Vulcan had to load Geske trucks.[31] After Lester had walked Powers away from Mike and Tigger, Powers asked if the picket was a "legal picket." Lester told Powers that there had been a change of venue on the

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[30]On cross-examination, Powers initially identified this man as "Dean Valento" and later as "Orlando." Because Lester was likely better acquainted than was Powers with Lester's associate, I accept Lester's "Rolando Jaimes" identification.

[31]Geske's opening brief states that it was "reasonable" for Tigger to ascertain from Powers why Geske's contract with Vulcan would not be honored, because "Powers was clearly the only Vulcan representative on site at this time" (at 15-16, fn. 15). As previously noted, Tigger testified at the state court trial that he gave a copy of the September 5 restraining order to "Al," who runs Vulcan's scale house.

restraining order from the state to the Federal court (see infra, part III,S), that determining the legality of the picket was Lester's and not Powers' responsibility, and that Lester considered it a legitimate picket. Powers said he understood, and walked toward his loader. Tigger intercepted him, tried to give him the pieces of paper, and said, "[T]his is a restraining order and by law you have to load me." Powers said that he chose to honor the picket sign. He eventually accepted the papers, but returned them to Tigger after Lester told Powers he did not need them and should return them. After Powers had driven his loader away, Mike Geske, who had been videotaping the incident since Powers first approached with the loader, told Tigger that they had what they needed and should leave. The Powers incident was observed by Geske employee Hansen, who had got down from his truck. Tigger, Hansen, and Mike Geske then drove away.

The videotapes taken by Mike Geske were not offered into evidence, either before me or before the state court.

Q. *Alleged Events on September 13, 1991*

On September 25, 1991, Geske truckdriver Hansen testified at the state court trial to the following effect: On September 13, 1991, two Norgard trucks, which he believed were coming from Vulcan, approached the entrance to Geske's plant. Both of them were carrying material, to be delivered to Geske, which is essential to making asphalt. As the Norgard trucks were about to turn into Geske's entrance, an unidentified man who had been standing with a group on Melahn property walked to a point near the first truck and about 1 foot off from the side of the road, raised his right hand with his straight palm facing away from his face, and waved. Both Norgard trucks stopped, at least one of them partly on the road and partly on Melahn property, and at least one Norgard driver conversed with the waver. Then, both trucks drove away without making a delivery.

R. *Other Alleged Activities By Locals 150, 301, and 1035*

On September 23, 1991, Tigger testified before the state court that 10 to 20 times, Local 150's business agents had followed him

when he was picking up materials for or delivering materials to Geske, at distances of 10 to 25 feet.[32] He further testified that Local 1035 Business Agent Bauman had followed him at a 30-foot distance. According to Tigger, these persons "followed us to all the jobs I did. A lot when I moved the paver, they always followed me to the next job." On September 24, he testified that he had seen other Geske drivers' vehicles being followed from the Geske plant to Geske's jobs by persons whom he believed to be associated with the picketers. He testified, without being asked for dates, to one occasion where he saw a Lake Zurich vehicle being followed down the conservation district road as far as Route 14; to another occasion where he saw a Parking Lot Services vehicle being followed part way down Route 14, after which he saw the following car at a parking lot job farther down Route 14; and to one occasion where a Tim's Excavating vehicle was followed on Route 14 to the intersection of Route 176, where the Tim's Excavating vehicle turned one way and the alleged followers turned another way. Also, he testified on September 24 that since August 19, when he came into the Geske plant, pickets and/or persons associated with them made obscene gestures and "stared [him] down." On September 25, 1991, Geske truckdriver Hansen testified before the state court that he had reported to work every day during the time that the Local 150 placards were there; that during this period he had seen Local 150 Business Representative Chuck August at the Geske plant just about every day and Local 301 Business Representative Layoff around the Geske plant about 20 times and parked at the Township job on one occasion; and that during this period he had seen Local 1035 Business Representative Bauman "just about every day" parked at the Dorr County jobsite during a 2-week period when Hansen was driving to that job on a daily basis.

On September 24, 1991, Geske driver Coss testified at the state court trial that on September 20, 1991, Laborers Local 1035 Business Representative Bauman was parked in his black pickup truck across the street from the Geske plant, and a red Jeep wagon

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[32]Tigger testified that Lester had followed him at a 10 or 15 foot distance while Tigger was going 50 to 55 miles an hour. At the state court trial, Quigley, whom Tigger identified as a follower, denied such activity.

was parked in the same area. Coss went on to testify to the following effect: On that day, he drove a Geske truck from the plant to Rockford, Illinois, a 35-mile distance, to get a load of gravel. Initially, his truck was followed by both vehicles. After the three vehicles had traveled a distance which is not shown by the record, the Geske truck was passed at a stoplight by the red Jeep, which at least after it passed the Geske truck proceeded at a 30- or 35-mile rate in a 45-mile-per-hour zone. Coss tried to pass the red Jeep by signaling an intent to pass and then going into the left lane of the highway, which is two lanes wide, but pulled back into the right lane after the Jeep moved into the left lane and drove at a lower speed than the Geske truck. When the speed limit increased to 50 miles an hour, the red Jeep increased its speed and temporarily vanished from Coss' sight. The black truck continued to follow the Geske truck. Eventually, at a point where the speed limit was still 50 miles an hour and the highway still had two lanes, Coss again saw the red Jeep ahead of him. The Jeep proceeded ahead of him at 35 or 40 miles an hour for 3 or 4 miles. When Coss again tried to pass the red Jeep, it again went into the left lane. Eventually, the red Jeep permitted Coss to pass, and then followed about two car lengths behind Coss at a rate of 45 to 50 miles an hour to Charles Lee's gravel pit. After the red Jeep began to follow Coss, the black pickup truck went back. The red Jeep drove off while Coss was on the scale.

S. *Geske's Motion for Sanctions and to Amend the Temporary Restraining Order; the Removal Proceedings*

On September 6, 1991, Geske filed with the state trial court a document captioned "Motion to Amend Temporary Restraining Order and to Seek Sanctions for Failure to Follow Temporary Restraining Order."[33] This motion averred, inter alia, that "Notwithstanding the service of the [circuit court's] orders . . .
[on occasion] Chuck August and the men [inferentially referring to those with Local 150 hats] sit there without the sign. . . . The

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[33]So stipulated by the parties. The document is stamped "Docketed September 9, 1991."

activity of defendants is an affront to the Court and makes a mockery of the Court's order." The motion sought amendment of the court's order (1) to fine Operating Engineers Local 150, and Teamsters Local 301, $ 1000 each for every day that they did not honor the court's order; and (2) to forbid "all representatives of Operating Engineers Local 150 and Teamsters Local 301 from having any persons within 1000 yards of the entrance of the Geske Asphalt plant on 420 Northwest Highway or any other facility of Geske or the locations of any suppliers where Geske is picking up supplies or the interference of any of Geske's customers;" on the ground that "the presence of these persons in view of their past conduct, continues to intimidate customers and suppliers of Geske."[34] Attached to this motion was an affidavit by Lori, dated September 6, which did not name Teamsters Local 301. This affidavit stated, inter alia, that after the service of the temporary restraining order, she had observed (1) "persons" refusing in August's presence to remove the signs that said "On Strike;" (2) "Several clusters of picketers are standing in the roadway diverting the attention of all suppliers and customers by obstructing the normal flow of traffic;" and (3) "August and two other persons wearing Local 150 hats continue to congregate opposite the plant where three picket signs are displayed which say 'On Strike' [their] presence, even when the picket sign is not showing, continues to intimidate our customers and interfere with our business." In addition, Lori's affidavit avers that "the activities have escalated substantially;" that more cars were "out there" than previously; that one car with the license plate "SCAB-BY" had an inflatable rat on its roof and a sign "Local 150 Rat Patrol" on its sides; and that suppliers and customers were intimidated by this activity and many were refusing to cross.[35]

Also on September 6, Operating Engineers Local 150 and Teamsters Local 301 filed in the United States District Court for the Northern District of Illinois, Eastern Division, a "Verified Notice for

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[34]Geske's counsel have repeatedly disavowed any effort to obtain an injunction against picketing generally.

[35]On September 13, 1991, she testified at the state court trial that she believed two pickets were "enough to be intimidating."

Removal" alleged that the proceeding was removable under 28 U.S.C. § 1441(a) and (b), on the ground that Geske was seeking damages for conduct define as an unfair labor practice under Section 8(b)(4) of the Act, over which the district court had original jurisdiction under Section 303 of the Act (cited as 29 U.S.C. § 187).

On a date which the parties stipulated was "shortly thereafter" but which is not otherwise shown by the record, Geske filed with the Federal district court a motion for remand of the matter to state court. On September 11, 1991, the Federal district court remanded the cause on the ground that Geske's complaint does not on its face contain a Federal claim.[36] The court stated that Locals 150 and 301 "may be correct that [Geske] will prove a claim that is preempted by federal law. [Locals 150 and 301] may also be correct that [Geske] may not even state a claim under state law. If so the state court can dismiss the complaint, either because of preemption or for failure to state a claim." That same day, Geske filed with the state trial court a copy of the Federal district court's remand.

Meanwhile, on September 10, 1991, with the Regional Director's approval, Geske withdrew its August 23 8(b)(4)(B) and 8(e) charges against Operating Engineers Local 150 (supra, part III,H). As to Geske's August 23 8(b)(4) charge (Case 33-CC-1053) against Local 301 (supra, part III,H), the Regional Director approved on October 24, 1991, a unilateral settlement agreement with a nonadmission clause, in which Local 301 undertook, inter alia, not to engage in, or induce or encourage individuals employed by Smith Cartage Company or any other person to engage in, a strike or a refusal in the course of his employment to handle any materials; and not to threaten Smith Cartage, Geske, or any other person; where, in either case, an object thereof is to force or require Smith Cartage to cease doing business with Geske or Geske to cease doing business with Patching (cf. supra, part III,B). On that same day, the Regional Director dismissed the remaining portions of Geske's charge against Local 301, which charge, inter alia, complained of pressure on

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[36]The district court noted, however, that par. 18 of the complaint as originally drafted alleged that Locals 150 and 301 were carrying out a secondary boycott. See supra, fn. 25.

Geske as to the picketing of Patching, and on neutrals as to the picketing of Geske, "with an untruthful sign, the signal effect of which is to falsely cause employees of neutrals to believe that the Union is 'on strike' when, in fact, the Union does not represent any employees of Geske and has never represented any employees of Geske." The dismissal letter stated, in part, that the settlement agreement "affords a full remedy for the conduct otherwise warranting complaint."

T. *Local 150's September 1991 Charges Against Geske*

Meanwhile, on September 9, 1991, Operating Engineers Local 150 filed with the Board's Regional Office a charge (dated September 4, and docketed as Case 33-CA-9545) which alleged that about August 19 and 21, Geske had violated Section 8(a)(1) of the Act by threatening and interrogating "bargaining unit employees" with respect to Local 150. On September 19, Local 150 filed an 8(a)(1) charge (dated September 16, and docketed as Case 33-CA- 9557-1) alleging unlawful interrogation of "bargaining unit employees" since September 16, 1991, by Lori and by Attorney Smetana. Local 150's withdrawal of these charges was approved by the Regional Director on October 29, 1991. Also on September 19, Local 150 filed the charge which gave rise to the case at bar.

U. *Geske's Filing of its Second Amended Complaint Against Locals 150 and 301; Subsequent Events*

1. The second amended complaint; the motion to dismiss on jurisdictional grounds

About September 12, 1991, Geske filed a second amended complaint against Operating Engineers Local 150 and Teamsters Local 301. Like the September 5, 1991, complaint/amended complaint, the second amended complaint alleged that Locals 150 and 301 had engaged in trade libel against Geske, and had tortiously interfered with Geske's contractual relations and prospective advantage. The second amended complaint included substantially the same factual allegations as did the amended complaint, and contained further allegations which included alleged incidents

involving Wicks, Evans and Sons, and Jack Pease Construction. Further, the prayer for injunctive relief in the second amended complaint added, to the prayer for relief set forth in the amended complaint, a request for injunctive relief with respect to the newly added factual allegations. Also, the second amended complaint failed to include the request in the first amended complaint for "judgment . . . an amount to be proved at trial," but added a request for "financial relief incidental to injunctive relief in amounts to be proved at trial."

On September 12, 1991, Local 150 filed a motion to dismiss the state court proceeding, pursuant to paragraph 2-615 or (alternatively) 2-619(1) of the Illinois Code of Civil Procedure (S.H.A. 735 ILCS 5/2-615, 619), on the ground that the court did not have jurisdiction of the subject matter of the action in that (1) the conduct complained of was preempted by the Act because protected or prohibited thereby; and (2) the claim for injunctive relief was prohibited by the Illinois Anti-Injunction Act.[37]

2. The trial before State Judge Sullivan

On about the same date that Geske filed its second amended complaint and Local 150 filed its motion to dismiss, the proceedings in the state court were transferred from Judge Pitluck to Judge Michael J. Sullivan, before whom a trial was held on 9 days between September 12 and 27, 1991. At the outset of the trial before Judge Sullivan, attorney Smetana requested "sanctions" of $ 1000 a day for every day Locals 150 and 301 at least allegedly violated Judge Pitluck's restraining order -- "$ 1000 a day and them to be 1000 yards away" (cf. supra, fn. 34 and attached text). Judge Sullivan stated that he would not amend Judge Pitluck's order, that Judge Sullivan would not impose the requested sanctions unless he were to find the sanctioned party to be in contempt of Judge Pitluck's order,

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[37]Par. 615, whose subject is motions with respect to pleadings, permits dismissal of the entire proceeding under certain circumstances. Par. 619(1) permits a motion for dismissal on the ground that "the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction."

and that Judge Sullivan would not simultaneously conduct a contempt proceeding and a proceeding on Geske's petition for a preliminary injunction. At this point, Smetana elected to proceed on Geske's petition for a preliminary injunction. The court deferred ruling on the motion for sanctions until the conclusion of the hearing on the petition for injunctive relief.

3. Activities by Laborers Unions at Geske's facility between July and October 1991

About July 1991, at the request of his "boss," Monroe Smith Jr., Laborers Local 1035 Officer Bauman began to "monitor" some sites where Geske was paving or getting ready to pave. About late August or early September, Smith told Bauman to "monitor" at the Geske property. Smith testified at the state court trial on September 23, 1991, that he visited the picket line at Geske on August 20, where he stayed about 5 or 10 minutes; and that he also went there on August 21. Bauman testified before me that between August 19 and September 17, 1991, while Local 150 was admittedly picketing Geske, he was present at Geske's facility on three to five occasions, and two to four times talked to someone on the jobsite at the asphalt plant, including (perhaps) one business agent. Bauman testified that he did not think Local 150 Business Representative August was there when Bauman was there after September 19. Geske truckdriv er Coss testified at the state court trial on September 24, 1991, that almost every day since August 19, he had seen Bauman right across from the entrance to the Geske plant, frequently with Local 150 Business Representative Chuck August and Local 301 Business Representative Layoff. Although Coss was not asked about this matter when he testified before me, on the basis of his and Bauman's demeanor I am inclined to regard Coss as a generally more reliable witness than Bauman; cf. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). During much of the period in question, however, Coss' opportunity to observe was limited by the fact that he worked at night, when (according to Lori's testimony at the state court trial) the plant was not picketed.

Bauman testified before me that his purpose in monitoring Geske's jobsites was to ascertain whether Geske was keeping track

of hours and paying prevailing wages; in the absence of any further explication (such as efforts to ascertain this by inspecting the records relevant to Geske of other contractors on the job), I discredit this testimony as unlikely. I also discredit Bauman's uncorroborated and unlikely testimony that Smith instructed him to monitor Geske's property "to see if we can get something through prevailing wages." I do accept, however, as at least partial explanations for Bauman's presence at Geske's plant while the pickets were using Local 150 signs, that he was there partly to follow Geske's trucks to try to monitor Geske's jobs, and partly to visit a Local 1035 member who was a personal friend and worked across the street.

During this August 17 through September 19 period, representatives of about 6 to 8 of the other 20-odd locals which were members of the Laborers' District Council were present at the Geske plant; of these locals, about 2 to 4 had "jurisdiction" in the area. Ernest Kumero[38] (who is the head of the Chicago District Council of Laborers, herein called the District Council) probably had authority to ask these other locals to come out; Smith could also have asked them "because we all work together, as far as the laborers."

Laborers' Local 1035 is a member of the District Council, which conducts monthly meetings called by Kumero. At a District Council meeting on a date not shown by the record, but inferentially before September 19, 1991, Smith, who was a Local 1035 delegate to the District Council, brought up the subject of putting pickets on Geske. Kumero thereupon said that Local 1035 would have the District Council's support.

After September 17, 1991, no picket signs naming Operating Engineers Local 150 were displayed at Geske facilities in 1991.[39] On

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[38]Also referred to in the record as Cumero and Cumereau.

[39]This finding is based on Chuck August's testimony before me, which was not contradicted at the hearing before me. A charge filed by Geske on June 12, 1992, and docketed as Case 33-CP-278, averred, inter alia, that Local 150's picketing "resumed" on May 7, 1992. So far as the record evidence shows,

(continued...)

September 23, 1991, Smith testified at the state court trial to the following effect: On a date which Smith could not recall, but when Local 150 was not picketing, Kumero telephoned him to start picketing Geske. The decision to start picketing on September 19 was made by the District Council. On September 18, after 3:30 p.m., Smith told Bauman to start picketing at Geske on September 19. Since Laborers' Local 1035 started picketing, business representatives from 10 or 12 Laborers' locals (including Locals 681, 152, 225, 25, 288, and 75) had been at the picket line.

Laborers' Local 1035 set up a picket line on September 19, 1991, which was maintained through October 2, 1991. Local 1035's picket signs were about 17 inches by 11 inches, and read, "Labor Local #1035 Demand Recognition from Geske & Son, Inc. as Laborers Bargaining Unit Representative." The president of Laborers Local 681, Randy Dalton, participated in this picketing and probably carried this picket sign. On September 23, 1991, Smith testified at the state court trial that at his and the District Council's direction, the Local 1035 pickets were supposed to keep records of the companies who made or tried to make deliveries. On September 23, 1991, Geske truckdriver McKelvey testified at the state court trial that Laborers Local 1035 Representative Bauman had been at the picket line "for the last week" and Local 150 Representative Smith had been there yesterday. McKelvey further testified that on one occasion after the signs were changed and Bauman or Smith was at the picket line, a car driven by someone whom McKelvey did not recognize started to follow him from the Oak Street job back to the Geske plant. Geske driver Coss testified on September 24, 1991, at the state court trial, that on September 20, when he was backed up

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[39](...continued)
between September 17, 1991, and May 7, 1992, Geske was not picketed with any signs stating that Local 150 was on strike against it. Moreover, on December 3, 1992 (the first day of the hearing before me), Geske stipulated, "On or about May 7, 1992, and continuing until on or about June 19, 1992, Local 150 picketed Geske, with picket signs which stated, 'IUOE on strike against Geske for unfair labor practices.'" However, a document dated November 23, 1993, and captioned "Respondent's Reply to the General Counsel's Opposition to the Admission of Certain Exhibits," states (at 2), "Local 150's 'On Strike' picketing continues even to this day."

at Meyer Material's pea gravel pile and the Meyer loader was preparing to load him, "a guy in a blue pickup with a sign in his hands," which was the "new sign" and not the Local 150 sign, came up, whereupon the loader pulled away.

4. Geske's September 1991 charges

On September 23 and 26, 1991, during the course of the trial before Judge Sullivan, Geske filed seven 8(b)(7)(C) charges with the Board's Regional Office. The five charges filed on September 23 (Cases 33-CP-268 through 33-CP-272) each consisted of identical allegations naming as respondents, Operating Engineers Local 150, the Construction General Laborers District Council of Chicago, and three affiliates of the District Council -- Locals 1035, 75, and 681. These five charges alleged that these five labor organizations had "acted in concert and continue to picket [Geske] for a reasonable period [sic] in excess of 30 days with an objective to obtain recognition from [Geske] for the employees of Geske without a petition for an election having been filed. Secondly said picketing is interfering with deliveries and said picketing is untrue." The September 26 charges (Cases 33-CP-273 and 33-CP-274) were filed against Teamsters Local 301 and Operating Engineers Local 150, respectively. These charges alleged, in part, that since about August 19, 1991, Locals 301 and 150 have "acted in concert and continue to picket with" each other; and that they "have each acted in concert and agents of each other by carrying signs with the inscription 'Local 150 on strike for recognitional and organizational purposes.'" Further, both charges alleged that Locals 150 and 301 were "each agents of and responsible for the picketing since September 19, 1991 by Laborers Local 1035 and as a continuation of the picketing violative of Section 8(b)(7)(C) conducted by Local 150 and Local 301 [whose] picketing and actions [have] interfered with neutral employers and deliveries to and from customers and suppliers at [Geske's] asphalt plant."

5. Geske's third amended complaint; Judge Sullivan's denial of Geske's request for a preliminary injunction

Also, about September 25, 1991, Geske attempted to file a third amended verified complaint, discussed below, which among other things added as defendants 3 unions (the Laborers District Council and its affiliated locals 681 and 1035), 10 union business agents, and employers Vulcan (supra, part III,D,E,J,P) and Melahn (supra, part III,D,U,3). Judge Sullivan did not allow the filing of this document at that time.

Before receiving any evidence, Judge Sullivan indicated on September 12 that the temporary restraining order would be continued until the hearing had been concluded. On the third day of the trial (September 16), a day devoted entirely to motions, Judge Sullivan stated that he had heard "sufficient evidence" to warrant denying the motion to vacate the temporary restraining order; before hearing any additional evidence, he stated on the fourth day of the trial (September 20), "The Court believes that there is sufficient matters in the record for this court not to vacate the temporary restraining order." On the seventh and eighth days of the trial, he renewed the temporary restraining order the ground that at the beginning of the trial, he had indicated that he would continue the temporary restraining order until the conclusion of the trial.

On September 26, 1991, after 8 days of hearing during which Geske called about 17 witnesses, Geske rested its case in chief on the motion for a preliminary injunction. On September 27, 1991, Judge Sullivan issued a bench decision granting the defendants' motion under Section 2-1110 of the Illinois Code of Civil Procedure for a directed finding, and denying Geske's request for a preliminary injunction.[40] He based this decision on the ground that as to the trade libel allegations the likelihood of success was small, and as to the

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[40]This section reads in part as follows:

Motion in non-jury case to find for defendant at close of plaintiff's evidence. In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered . . .

tortious-interference allegations Geske had not established that it had likelihood of success on the merits.[41] Judge Sullivan held that the message on the picket signs did not constitute actionable trade libel under *Vee See Construction Co. v. Jensen and Halstead, Ltd.*, 79 Ill. App. 3d 1084, 34 Ill. Dec. 444, 399 N.E. 2d 278 (Ill. App. Ct., 1st Dist., 4th Div., 1979), cited in Geske's September 5, 1991 motion for a temporary restraining order and for a preliminary and permanent injunction. Judge Sullivan stated that where (as in the case before him) the plaintiff is a corporation, under *Vee See, supra*, the complained-of statement "must be allegedly defaming the plaintiff in its trade or business, must assail the corporation's financial position or business methods or accuse it of fraud or mismanagement," and that no reasonable extension of the message on the signs "could be thought to assail the corporation's financial position or business methods or accuse it of fraud or mismanagement." As to *Lowe Excavating Co. v. International Union of Operating Engineers, Local No. 150*, 180 Ill. App. 3d 39, 129 Ill. Dec. 300, 535 N.E. 2nd 1065, 131 LRRM 2786 (Ill. App. Ct., 2nd Dist., 1989), *Ill. app. denied* 126 Ill. 560, 541 N.E. 2d 1107 (1989), *U.S. cert. denied* 110 S.Ct. 499 (1989), heavily relied on by Geske, Judge Sullivan stated that it addressed whether that lawsuit (a defamation action brought under Illinois law) was preempted by the Act, and not whether the complained of statements constituted trade libel against a corporation under Illinois law. As to the allegations of tortious interference with contractual relations and prospective advantage, Judge Sullivan found that there had been a certain level of interference with Geske's business, but that "by the very nature of having the picketers . . . does have an interfering -- you know, that's intended . . . that in a part of it." He further stated that there was no evidence of violence or threats of violence and little or no evidence of unlawful trespass, no significant wrong appeared to have been committed in connection with following cars, and the evidence as to any illegal interference in connection with stopping traffic on the county conservation road was not particularly strong.

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[41]In the alternative, he relied on the state anti-injunction statute.

In light of the court's denial of injunctive relief, Geske did not pursue its September 6 request for sanctions against Local 150 for alleged violation of the temporary restraining order. Judge Sullivan's order denying Geske's request for a preliminary injunction included an order granting Geske's September 25 request for leave to file a third amended complaint. Such an amended complaint was in fact filed by Geske that same day. This third amended complaint added various new defendants and allegations. Newly named as defendants were two employers (Vulcan and Melahn); three labor organizations (Construction General Laborers' District Council of Chicago; Laborers' International Union of North America, Local 681; and Laborers' International Union of North America, Local 1035); and 12 individuals who were business agents-and/or officers of certain labor organizations.[42] Of these 12, 6 were business representatives and/or officers of Operating Engineers Local 150 (Chuck August, Robert Paddock, Gary Laney, Michael Quigley, Kal Lester, and Angel Delrivero); 2 were business representatives and/or officers of Teamsters Local 301 (Bud Layoff and Mike Haffner); 2 were business representatives and/or officers of Laborers Local 681 (Randy Dalton and Tom Penny); and 2 were business representatives and/or officers of Laborers Local 1035 (Monroe Smith Jr., and Gerald Bauman).[43] As to the two original defendants in this state proceeding (Operating Engineers Local 150 and Teamsters Local 301), the third amended complaint included virtually all the allegations in the second amended complaint. As to all the defendant labor organizations and individuals, the third amended complaint requested not only injunctive relief, but also financial relief "incidental to injunctive relief," together with costs, attorneys' fees, and "such other relief as this Court deems just and proper."

6. The dismissal of Geske's September 1991 8(b)(7)(C) charges

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[42]I do not understand the statement in Geske's opening brief to me (at 41) that "none of the persons engaging in the picketing and allegedly libelous statements are involuntarily made defendants . . . the union's business agents who engaged in driving Geske's customers away are first named as agents of Local 150."

[43]The complaint misspelled his name as Bowman.

Among the evidence submitted to the Regional Director in the investigation of Cases 33-CP-268 through 33-CP-274 were the transcripts of the proceeding before the state court. On October 7, 1991, with the Regional Director's approval, Geske withdrew the charges in Cases 33-CP-269 through 33-CP-272 (that is, the 8(b)(7)(C) charges against the Laborers' District Council and its Locals 1035, 75, and 681). On October 8, 1991, the Regional Director dismissed the charges in Cases 33-CP-268, 33-CP-273, and 33-CP-274 (that is, the September 1991 8(b)(7)(C) charges against Operating Engineers Local 150 and Teamsters Local 301). The Regional Director's dismissal letter stated, in part:

> The investigation disclosed that the Employer was initially picketed from August 19, 1991 (all dates 1991) until September 18. The picket signs read: "I.U.O.E. Local 150 on strike against Geske for representation as majority bargaining representative of company's operating engineer employees." On September 20, Laborers' Local 1035 began picketing the Employer with signs which stated that Geske did not have a contract with Local 1035.
>
> During the time that Local 150 was picketing, business agents of Local 150 and Local 301 carried the Local 150 signs and made appeals to Geske's employees, suppliers and customers. There was no evidence that Local 150 or its agents engaged in any such conduct after September 18. Further, the fact that Local 150's picket sign read "on strike . . ." does not make the picketing proscribed under the proviso to 8(b)(7)(C), as you contend, because it is untrue. While Geske employees are not "striking" and, therefore, the picket sign can be deemed to be directed at employees rather than the public (*United Brotherhood of Carpenters and Joiners of America, Local No. 1849*, 208 NLRB 461 (1974) which you cited supports that conclusion) your argument is otherwise misplaced. The publicity proviso is intended to allow a defense to an 8(b)(7)(C) charge by a labor organization which chooses to advise the public truthfully that the employer does not employ members of or have a contract with that labor organization. Local 150 is not claiming such a defense nor denying its recognitional object. Moreover, as stated above, Local 150 has not picketed

in excess of 30 days. In this regard, there is no probative evidence to establish that the picketing by Local 1035 which commenced on September 20 had, as an object, the recognition of Local 150 by Geske. Local 1035's picket sign clearly stated Geske has no contract covering its laborer employees. Although there is some evidence that the separate periods of picketing by Local 150 and Local 1035 may have been coordinated, the evidence is insufficient to establish that the picketing constituted joint and concerted activity to warrant the conclusion of a joint venture. See *Laborers Union Local 383 (Colson and Stevens)*, 137 NLRB 1650 *affd.* 323 F.2d 422 (C.A. 9) 1963; *International Union of Operating Engineers, Local, AFL-CIO et al. (Seward Construction Company, Inc.)*, 193 NLRB 632 (1971). In these circumstances it cannot be proven that the two unions were doing anything other than cooperating as was done by the unions in [*United Brotherhood of Carpenters and Joiners, Local Union No. 2064 (Westra Construction, Inc.)*, 175 NLRB 881, 883 (1969)]. Cooperation between unions to achieve separate objectives does not eliminate each union's statutory right to picket up to 30 days for recognition without a representation petition being filed. Accordingly, there is insufficient evidence to prove Local 150 violated Section 8(b)(7)(C) of the Act as alleged.

With respect to the charge against Local 301, the fact that a Local 301 business agent may have assisted Local 150 and Local 1035 in their respective picketing and other conduct does not establish that Local 301 ever picketed Geske with a sign that bore its identity or made any recognitional demand in its own name. Nor is there evidence that Local 301 otherwise made a demand upon Geske for recognition on its behalf. In these circumstances, at most Local 301's conduct could only be found to be on behalf of Local 150 or Local 1035 (i.e., that the Local 301 business agent was an agent of Local 150 or Local 1035, respectively, during their separate periods of picketing). Inasmuch as I have previously concluded that Local 150 did not picket in excess of 30 days, even assuming Local 301 acted as Local 150's agent during its picketing, this conduct does not establish a violation of Section 8(b)(7)(C) of the Act as alleged.

On February 25, 1992, the NLRB Office of Appeals denied Geske's appeal "substantially for the reasons set forth in the Regional Director's [dismissal] letter."

7. The voluntary dismissal of Geske's third amended complaint as to certain defendants

Meanwhile, about October 14, 1991, Geske filed with the state circuit court a motion to dismiss voluntarily its complaint against Laborers District Council and its locals 681 and 1035, the individuals who were officers and/or business agents of these labor organizations (Randy Dalton, Tom Penny, Monroe Smith, and Gerald Bauman); Vulcan; and Melahn. By order dated October 17, 1991, this motion was granted without prejudice.[44] Geske's reply brief states that the complaint against Melahn "was voluntarily dismissed after he indicated that he had never given permission to the Unions to be on his property and that would continue to be his policy in the future. Vulcan was similarly dismissed from the suit after they again continued to contract with Geske" (at 24-25; see also 4-5 of Geske's reply Br. and 14 fn. 14 of Geske's opening Br.). Further, Geske's reply brief states (at 24) that the remaining voluntary withdrawals were made "pursuant to a Settlement Agreement between Geske and the Laborers in which they agreed to cease all such conduct in the future and similarly agreed to withdraw their unfair labor practice charges against Geske;" see also, page 9 fn. 7, page 11 fn. 9 of Geske's opening brief and Geske counsel Smetana's letter to me dated November 8, 1993. Counsel have not favored me with any citations to the record in connection with these assertions as to the events which preceded Geske's withdrawal requests or

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[44]The order also dismissed counts 4 and 5 against all defendants. Count 4 was based on Vulcan's alleged refusal to load Geske because of alleged conduct by the other defendants (except Melahn). Count 5 (misnumbered 4 in the third amended complaint) was based on Melahn's conduct in allowing the other defendants (except Vulcan) to remain on the exterior of Melahn's property, even after being notified by Geske that these defendants' presence and actions "constituted trade libel and tortious interference with [Geske's] contractual relations and prospective advantage." Cf. supra, fn. 11.

Geske's motive for seeking withdrawal, and I can find nothing in the record to support such assertions.

8. Local 150's motion to dismiss Geske's third amended complaint and its counterclaim against Geske for malicious prosecution

On October 15, 1991, Operating Engineers Local 150 filed a motion to dismiss the still-pending portion of Geske's third amended complaint, and a counterclaim against Geske for malicious prosecution. On December 5, 1991, Geske filed a motion to dismiss Local 150's counterclaim. Each party filed briefs on these motions. As of December 7, 1993, these motions were still pending (see infra, part III,U,11).

9. Local 150's withdrawal of certain 8(a)(1) charges; Geske's interlocutory appeal of Judge Sullivan's September 1991 order; Judge Sullivan's stay of Geske's state court lawsuit

About October 18, 1991, Geske filed an interlocutory appeal from the state trial court's denial of injunctive relief. On October 29, 1991, the Regional Director approved Operating Engineers Local 150's withdrawal of the charges in Cases 33-CA-9545 and 33-CA-9557-1 -- that is, the charges alleging unlawful threats of discharge and shutdown, and unlawful interrogation, in connection with Local 150 activity (supra, part III,T).

On November 13, 1991, Local 150 served on Geske, in connection with the state proceeding, Local 150's first set of interrogatories and its first request for presentation of documents. On March 16, 1992,[45] Geske filed with the state trial court a motion to stay further proceedings in the trial court pending the decision of the Second District Appellate Court concerning Geske's interlocutory appeal. The motion alleged in part, "the Second District Appellate Court's decision on the issues appealed from will determine, to a

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[45] All dates hereinafter are 1992, unless otherwise stated.

large degree, the course of further litigation in the trial court . . . all parties to this action will continue to [litigate] matters that will ultimately be determined by the decision of the Appellate Court. The continued litigation concerning issues that may be rendered moot by the Appellate Court would be fruitless." On March 16, 1992, Judge Sullivan, over Local 150's objection, issued an order drafted by Geske's counsel "that all proceedings in this matter are hereby stayed pending the decision (or any appeal therefrom) of the 2d District Appellate Court."

10. The processing of the instant charge against Geske; the Regional Director's "*Loehmann*" letter

Meanwhile, on an undisclosed date, the Regional Director referred the September 1991 charge in Case 33-CA-9557-2 (the charge which gave rise to the case before me), including the request set forth therein for relief under Section 10(j) of the Act, to the General Counsel's Division of Advice. On March 24, 1992, Local 150 filed its first amended charge in Case 33-CA-9557-2, renewing its request for 10(j) relief.

As previously noted, on March 30, 1992, the Regional Director issued the original complaint in the case at bar; this complaint alleged that Geske had violated Section 8(a)(1) by filing, maintaining, and prosecuting in state court a lawsuit including certain causes of action which are without reasonable basis and were motivated by an intent to retaliate against the protected concerted activity of Operating Engineers Local 150 in seeking to organize Geske's employees by engaging in lawful recognitional picketing. On April 1, 1992, the Regional Director sent virtually identical letters to the respective clerks of the state trial court and the state appellate court, with courtesy copies to Geske, Lori Geske, and Geske counsel, among others. After setting forth the title and docket number of Geske's state court lawsuit, these letters read as follows:

> I am writing to you as Regional Director of Region 33 of the National Labor Relations Board (Board). On March 30, 1992, I issued an unfair labor practice complaint in Case 33-CA-9557-2, alleging that Geske and Sons, Inc., is violating Section 8(a)(1) of the National Labor Relations Act by unlaw-

fully interfering with the protected concerted activity of Operating Engineers Local 150 in seeking to organize the employer's operating engineer employees by engaging in lawful recognitional picketing.

As a result of the issuance of the complaint, state court jurisdiction is preempted until such time as the Board holds that the state court suit has a reasonable basis and was not filed in retaliation for the Union's protected conduct. See *Loehmann's Plaza*, 305 NLRB [663, 669-672, 675 (1991)]. [46] Accordingly, the state court action should be held in abeyance pending the Board's decision.

A copy of this letter is being sent to Geske and Sons, Inc. This party may not actively pursue the state court lawsuit and has seven (7) days to seek a stay of the state court proceeding. If there is an outstanding injunction, this party has seven (7) days to seek to have it withdrawn. If Geske and Sons, Inc. fails to heed these instructions, it may be subject to additional liability under Section 8(a)(1) of the Act.

11. The actions of the state appellate and supreme courts, and of the Supreme Court of the United States; Geske's 1992 8(b)(7) charges

On April 7, 1992, the state appellate court, on its own motion, ordered the parties in the state court proceeding pending before it to file a response to the Regional Director's April 1 letter within 10 days and incorporate any appropriate motion to stay the appeal. On April 17, 1992, Operating Engineers Local 150 filed a motion to summarily dismiss Geske's appeal or, in the alternative, to stay the state court proceedings until conclusion of the litigation before the Board. A document filed by Geske with the state appellate court on April 23, 1992, states that "on April 7, 1992, per telephone conference with counsel for [Geske], the Board agreed to extend the time in which [Geske] had to respond to [the Regional Director's] letters to April 14, 1992." On April 8, 1992, Geske's counsel filed with the

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[46] I discuss infra (part III,V,1), Geske's contention that *Loehmann's Plaza*, supra, is no longer viable in connection with the instant case.

appellate court a motion for an extension of time within which to file Geske's reply brief. By order dated April 14, 1992, the appellate court extended the due date for Geske's reply brief to May 4, 1992. On April 23, 1992, Geske's counsel filed with the appellate court a motion for various extensions of time to file (1) its response to the Regional Director's April 1 letter; (2) its response to Operating Engineers Local 150's motion to dismiss or, alternatively, to stay Geske's appeal; and (3) Geske's reply brief. This motion was granted by the appellate court, with the effect, inter alia, of extending to April 30, 1992, the due date of Geske's response to the Regional Director's April 1 letter and to Local 150's motion to dismiss or alternatively to stay the appeal.[47] On that date, Geske filed with the appellate court an opposition to that motion by Local 150. Also on April 30, 1992, the Regional Director amended the original complaint in the case at bar by adding the allegation that Geske violated Section 8(a)(1) by filing, maintaining, and prosecuting the state court lawsuit with certain causes of action which are preempted by the Act. On May 19, 1992, the appellate court entered an order denying Local 150's motion to dismiss the appeal; however, as to Local 150's motion to stay the appeal, the court stated:

> The appeal is stayed pending determination by the National Labor Relations Board whether the pending lawsuit has any reasonable basis. [Geske] is ordered to inform this Court within 90 days as to the status of the determination by the National Labor Relations Board.

A document filed with the state appellate court by Geske's counsel dated May 27, 1992, and captioned "Motion of Plaintiff-Appellant [Geske] for Reconsideration of Court's Order Staying Appeal on May 19, 1992," avers that counsel did not receive that order until May 27. The appellate court's April 29 order had extended the May 4 due date for Geske's reply brief to 14 days after the appellate court's decision on the motion to stay. Geske filed a reply brief in the appellate court dated May 28, 1992.

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[47]Attached to this opposition is an inaccurate copy of an Advice memorandum discussed infra, fn. 64 and attached text.

Meanwhile, about May 7, 1992, and continuing until on or about June 19, 1992, Local 150 picketed Geske with picket signs which stated, "IUOE ON STRIKE AGAINST GESKE FOR UNFAIR LABOR PRACTICES" (see supra, fn. 39). On May 29, 1992, Geske filed with the appellate court a "Motion for Reconsideration of Court's Order Staying Appeal on May 19, 1992;" and, on the basis of this picketing, an "Emergency Motion for an Expedited Hearing in View of Continuing Picketing in Reckless Disregard for the Truth." Geske's motion for reconsideration alleged, in part:

> The issue on appeal is strictly a state law question of what constitutes trade libel under the laws of Illinois, which we contend was unreasonably applied by Judge Sullivan.[48]

Geske's "Emergency Motion" alleged, in part:

> [I]t would be futile to go back to [trial] Judge Sullivan in light of his erroneous view that there is no trade libel in this case because "on strike" is accepted parlance absent evidence of violence or threats there of. . . . Going before Judge Sullivan with this motion would be futile because his erroneous prerequisites of violence or threats of violence are not present here.

On a date not shown by the record, Local 150 filed an opposition to the May 29 motions. On June 4, 1992, Geske filed a response to this opposition. This response stated, in part:

> [Geske's principal] assertion . . . is the futility of making an application to the circuit [trial] court . . . the underpinning of

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[48]Rather similarly, Geske's April 9, 1993, appeal to the Supreme Court of Illinois, which appeal is attached to Geske's April 14, 1993, opening brief to me, states, "The claims of tortious interference stand or fall with the claim of trade libel." Further, Geske's April 1993 opening brief to me states (at 23), "What statements are libelous is the key question here." However, Geske's June 1993 reply brief to me states (at 2), "This is not a case where the only question for the state court to resolve is whether Local 150 was actually 'On Strike' Rather, the state court must view not only the union's [sic] statements, but also its [sic] collective conduct to determine whether the tortious counts are valid."

> Judge Sullivan's decision on preliminary injunction, which is the subject of the appeal to this Court, would make it futile to ask Judge Sullivan to grant the very relief he has already denied.

On June 24, 1992, the appellate court denied Geske's May 29 motions.

In June 1992, the General Counsel rejected Local 150's request for 10(j) relief against Geske.

On June 29, 1992, on the basis of the May 1992 picketing previously mentioned, Geske filed against Local 150 two charges which, taken together, alleged that Local 150 had violated Section 8(b)(4)(i), (ii)(A), and (B) of the Act by trying to cause Edscott Toyota and Duggan Trucking to cease doing business, and to agree to cease doing business, with Geske. Geske withdrew these charges on July 9, 1992. On July 7, 1992, Geske filed two substantially similar charges against Local 150; Geske withdrew these charges on July 23.

On June 12, 1992, Geske filed a charge against Local 150 (Case 33-CP-278) alleging that it had violated Section 8(b)(7)(C) of the Act. The charge alleged, in part:

> Since on or about August 19, 1991 [Local 150] has picketed for a period in excess of 30 days where an object is to obtain recognition from Geske.
>
> Said picketing resumed on May 7, 1992 with the reopening of [Geske's] construction season . . . with "ON STRIKE" signs where an object of the picketing continues to be recognitional.

About July 13, 1992, the Regional Director dismissed the June 1992 8(b)(7)(C) charge in light of the undertakings in a unilateral settlement, approved by him, which contained a nonadmission clause and read in part as follows:

> [Local 150] will cease picketing Geske . . . entirely for a reasonable period of time and, if it ever resumes picketing

> Geske . . . said picketing shall not be for an unlawful object or conducted in an unlawful manner.
>
> This Agreement resolves only those allegations raised in Case 33-CP-278 and no other allegation, and is not intended to settle, resolve, dispose of or preclude litigation on any other matter, regardless of whether such other matter is now known or unknown to the General Counsel or whether such other matter is or is not now pending before the Board.

The Regional Director's dismissal letter stated, in part, that it would not effectuate the purposes of the Act to institute further proceedings "since the [Settlement] Agreement affords a full remedy for the conduct otherwise warranting complaint." Geske's appeal from the dismissal of the charge was denied by the Office of Appeals.[49] On October 27, 1992, Local 150 signed a "Notice to Employees" for purposes of posting pursuant to this settlement agreement.

About August 18, 1992, the state appellate court issued a schedule for oral argument, showing that Geske's appeal was set for argument on September 22, 1992. Geske filed a status report with the appellate court on August 20, 1992. By letter dated August 21, 1992, Local 150's counsel stated that Geske's status report was accurate, but asked whether the oral argument schedule had been issued in error. By letter dated August 25, 1992, Geske urged that the court proceed to the scheduled oral argument, noting, inter alia, that the General Counsel had not sought relief under Section 10(j). By order issued September 14, 1992, the appellate court vacated the stay entered on May 19, 1992, and affirmed the oral argument schedule. By letter to the clerk of the appellate court dated September 15, 1992, after the issuance of the order vacating the stay but (inferentially) before receiving a copy, the Regional Attorney for Region 33 requested that the state court proceedings be stayed pending the Board's decision in the case at bar. This letter stated, inter alia, that Local 150's request for 10(j) relief in the case at bar had been denied because of the stay of court proceedings. In

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[49]I see nothing in the record to support Geske's assertion (reply Br. 21 fn. 14) that contemporaneously with the 1992 picketing, Local 150 said that it wanted Geske to sign a contract.

October 1992, the Regional Office again denied Local 150's request for 10(j) relief.

Meanwhile, by order dated September 29, 1992, the state appellate court unanimously affirmed the trial court.[50] On December 1, 1992, Geske filed a petition for rehearing with the state appellate court. The petition alleged, in part, that "in the labor arena," the "libel per se" standards which were set forth in *Vee See*, supra, 399 N.E. 2d at 281, and which up to that point had caused judicial rejection of Geske's libel claim, had been preempted by *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), and by *Letter Carriers, Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974); *cf. infra* fn. 52.[51] This petition was denied on January 5, 1993 (at 2 of attachment E to Geske's opening brief to me). On April 9, 1993 (id.), Geske petitioned the Illinois supreme court for appeal as a matter of right or leave to appeal. The Illinois supreme court denied this petition on June 3, 1993. On June 17, 1993, Geske filed with the Illinois supreme court a motion to stay the mandate for 60 days, on the ground that Geske had determined to file a petition for certiorari with the Supreme Court of the United States. Geske's motion (signed by attorney Smetana) stated, in part, that the state appellate court

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[50]The order is stamped, "This order is not precedential and is not to be cited." A motion to me by Geske dated July 13, 1993, with a long caption which begins "Motion of [Geske] to supplement record with Supreme Court of Illinois Order Staying Mandate," attaches a December 16, 1992 order by the Illinois appellate court which denies a motion by Local 150 "pursuant to Supreme Court Rule 23, to change the decision from an unpublished order to a published opinion." I discuss infra (part III,V,2) the effect on the instant proceeding of this stamp and December 1992 order.

[51]Geske's petition for rehearing also relied upon a claim that after Vee See, the Illinois legislature had overruled Illinois common law by permitting lawsuits against a "voluntary unincorporated association" (defined as "any organization of 2 or more individuals formed for a common purpose") in it own name. S.H.A. 735 ILCS 5/2-209.1. Prior to the enactment of this statute, suits against unincorporated labor organizations were entertained for equitable relief, although not for money damages. See *American Federation of Technical Engineers, Local 144 v. La Jeunesse*, 63 Ill. 2nd 263, 347 N.E. 2d 712, 715 (S. Ct. Ill. 1976). Geske's opening brief to me states that the case against Local 150 was filed in equity (at 22, fn. 23).

failed to follow the mandate of the U.S. Supreme Court as set forth in *Linn v. Plant Guards*, [383 U.S. 53] (1966) adopting the standards set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) creating partial preemption of state libel laws to the extent that the court mandated that in a situation involving a "labor dispute," the only standard that can be followed by the state in determining the extent of trade libel by a union is that the defamatory statement is actionable only where it is published "with knowledge of their falsity or in reckless regard for the truth."

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In its Petition, Geske will also urge, as we urged before this Court, that further support for the mandatory reading of its standard in defamation cases is found in the U.S. Supreme Court's Decision in *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974). In that case, the U.S. Supreme Court . . . reversed the Virginia Supreme Court for its failure to follow the *Linn v. Plant Guard* and *New York Times* standard holding that there is a partial preemption mandating this standard to be applied.[52]

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[52]Rather similarly, Geske's June 1993 reply brief to me (at 10 fn. 8) states that *Linn*, *supra*, "dictates to state tribunals the manner in which trade libel is to be interpreted." Then, after quoting the statement in *Austin*, *supra* 418 U.S. at 281 [quotation marks omitted, emphasis added by me], "recovery can be permitted only if the defamatory publication was made with knowledge that it was false or with reckless disregard of whether it was false or not," Geske states, "In refusing to adopt this standard, the Illinois Appellate Court . . . failed to properly follow the Supreme Court's mandate." In addition, Geske's reply brief to me states (at 13 fn. 12, emphasis added), "The fact that Judge Sullivan . . . believed on the evidence before him that preliminary injunctive relief was not appropriate because Geske had not met a legal standard on the merits of trade libel that was more stringent than the *Linn*, *New York Times* standards was simply wrong." Furthermore, Geske's November 1993 reply brief to the Supreme Court of the United States in support of Geske's petition for certiorari, which reply brief Geske forwarded to me, stated (at 7-8) that *Austin* requires "a single national libel standard articulated in *Linn*;" and further asserts that NLRB Chairman James M. Stephens, in his concurring opinion in *Bill Johnson's Restaurants*, 290 NLRB 29 (1988), "recognizes the mandate for a single federal standard after *Austin*." In attempted support of this assertion, Geske quotes the following portions of the Chairman's concurrence (290

(continued...)

....

> The stay is further sought as the respondent union has filed a Motion to Dismiss the underlying case which will be heard by Judge Sullivan in the Circuit Court upon issuance of the Mandate, and in view of the final Order of the Second District affirming an erroneous standard of trade libel when the Petition for Injunctive Relief was filed before the Circuit Court under the *Linn v. Plant Guard* [383 U.S. 53]/*Lowe Excavating* [180 Ill. App. 3d 39, 123 Ill. Dec. 300, 535 N.E. 2nd 1065] standard, there is little likelihood that the Circuit Court will act other than to dismiss. There is further almost no likelihood that the Second District would reverse such a dismissal.

Geske's motion to the Illinois supreme court for stay of mandate was received in evidence before me pursuant to a motion by Local 150 dated June 29, 1993, to supplement the record. Local 150's motion put special emphasis on the last two quoted paragraphs of Geske's motion. Geske's July 13, 1993, opposition to this motion

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[52](...continued)
NLRB at 33-34) [emphasis added]: "[T]he [Supreme] Court set out [in *Linn*] a Federal standard for determining whether a particular libel could be found to be actionable . . . a state court that substitutes state common law principles for that standard and permits a state law remedy for speech that would be protected under Federal law is properly reversed." However, on December 3, 1992, the first day of the hearing before me, the following colloquy occurred:

> JUDGE SHERMAN: Well, as I understand it, what the Supreme Court said [in *Linn*] was that . . . at least in cases involving labor disputes . . . the States could create and enforce a cause of action based upon [libel] if the *New York Times v. Sullivan* standard was used. But that it would not require the States to [permit a libel] action even in these circumstances...
>
> MR. AVAKIAN [Respondent's counsel]: I think that is clear and I don't disagree with your recollection.

Moreover, Geske's opening brief (at 25) (although stating that *Linn* "completely occupies the field of labor libel") quotes the statement in *Linn* (383 U.S. at 65) that to construe the NLRA so as to "permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act" (emphasis added by me). See also supra fn. 36 and attached text.

was signed by Attorney Smetana, and stated, in part, "It is wholly inappropriate for Your Honor to consider [Local 150's] suggestion . . . that the undersigned's reference in its Motion to Stay Mandate . . . in which . . . Local 150 called the ALJ's attention to [Geske] counsel's private conjecture concerning what Judge Sullivan, the trial judge, might do on the merits of the trade libel cases, is in any way probative before Your Honor." In receiving this June 17 motion into evidence on August 9, 1993, I observed that these paragraphs are "arguably entitled to probative weight in determining whether Geske acted in good faith in maintaining and prosecuting the lawsuit." By letter to me dated August 19, 1993, Geske attorney Avakian stated, in part, "Geske has been informed by the Circuit Court that the underlying state court case has been transferred from Judge Sullivan to Judge Franz. This transfer to a new state court judge to hear the merits of the case significantly modifies Geske's speculation as to how the assigned judge might view the issues."

In that same letter, Avakian stated that on August 10, 1993, Justice John Paul Stevens issued an Order allowing the filing of Geske's petition for writ of certiorari to and including October 1, 1993. Such a petition was filed on that date (No. 93-528, *Geske & Sons Inc. v. Operating Engineers Local 150*, 62 U.S. Law Week 3289) and denied on November 29, 1993 (114 S.Ct. 551). Under a covering letter dated December 9, 1993, advising me of the Supreme court's action, Avakian enclosed a copy of an order issued on December 7, 1993, by Judge Sullivan, the state trial court judge who denied Geske's motion for a preliminary injunction. Among other things, this order granted Geske's motion for leave to further amend the complaint and to supplement its opposition to defendants' motion to dismiss. In addition, Judge Sullivan's order reset the case for a status hearing on March 24, 1994.

IV. ANALYSIS AND CONCLUSIONS

A. *Whether Geske Violated Section 8(a)(1) by Filing, Maintaining, and Prosecuting a State Court Lawsuit with Causes of Action which are Preempted by the Act*

As previously noted, the portions of the March 1992 complaint which were added thereto on April 30, 1992, allege that since on or about September 5, 1991, Geske had filed, maintained, and prosecuted its state court lawsuit, with causes of action for trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage, that are preempted by the Act, thereby violating Section 8(a)(1) of the Act. As to this branch of the case, the General Counsel heavily relies on *Loehmann's Plaza, supra*, 305 NLRB at 663.

In *Loehmann's Plaza, supra*, the Board began by finding that a retail store and its landlord violated Section 8(a)(1) of the Act by demanding that union representatives, who were not employed by the retail store, stop engaging in peaceful area standards picketing and handbilling protected by the Act in certain areas which were owned by the landlord and leased by it to the store. In so finding, the Board relied on *Jean Country*, 291 NLRB 11 (1988).

Then, the Board went on to consider whether the landlord and the retail store had further violated Section 8(a)(1) by pursuing in state court a lawsuit which sought injunctive relief as to the number and location of pickets and handbillers. As to the period after the issuance of the *Loehmann's, supra*, complaint alleging that the landlord and the retail store had further violated Section 8(a)(1) by continuing to pursue the lawsuit. The Board found that because the picketing and handbilling were "protected by Section 7" (305 NLRB at 671; see infra), the lawsuit (1) had a tendency to interfere with (indeed, it was designed to stop) the exercise of a Section 7 right, and (2) was preempted by the proceeding before the Board. Accordingly, the Board found that after the General Counsel had issued his complaint, the landlord and the retail store had violated Section 8(a)(1) by actively pursuing the state court lawsuit, even though the record failed to show that they proceeded with a retaliatory motive. The Board stated (305 NLRB at 670-671, footnotes omitted):

> [O]nce the General Counsel decides to initiate a formal adjudicatory proceeding, the Board's jurisdiction is invoked and it becomes the exclusive forum for an adjudication of a

respondent's property rights. Because at that point the state court tribunal "has no power to adjudicate the [preempted] subject matter," any attempt to continue the litigation necessarily amounts to pure harassment, i.e., an effort to subject the defendant or defendants in the lawsuit to litigation costs and burdens before a tribunal that indisputably lacks jurisdiction over the matter at that time.

As stated above, at the point of preemption . . . the "normal" requirements of established law apply. Under settled principles, a violation of Section 8(a)(1) is established if it is shown that the employer conduct has a tendency to interfere with a Section 7 right. Accordingly, if the Board in the unfair labor practice proceeding finds that picketing or handbilling on the property in question is protected by Section 7, and if a preempted state court lawsuit is aimed at enjoining that Section 7 activity, it is clear that the lawsuit tends to interfere [with] (indeed, it is designed to stop) the exercise of a Section 7 right. Accordingly, the lawsuit is unlawful under Section 8(a)(1).
As an employer's unlawful exclusion of employees or union representatives from its property violated Section 8(a)(1) without regard to the employer's motive for excluding them, there is no reason for requiring a showing of retaliatory motive when the employer pursues a preempted trespass suit seeking the same end. Accordingly, in cases concerning the lawfulness of preempted state court trespass lawsuits, we shall not require that retaliatory motive be shown as an element of an 8(a)(1) violation.

As to the holding in *Bill Johnson's*, supra, 461 U.S. at 738, 744, that the lawsuit at issue there could not violate Section 8(a)(1) absent a retaliatory motive, the Board pointed (305 NLRB at 669) to footnote 5 of *Bill Johnson's*, supra, 461 U.S. at 738, where the Court said:

[W]hat is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of fed-

> eral-law preemption, or a suit that has an objective that is illegal under federal law. [The employer] concedes that the Board may enjoin these latter types of suits . . . Nor could it be successfully argued otherwise.

See also Local 30, United Slate, Tile & Composition Roofers v. NLRB, 1 F.3d 1419, 1426-1427 (3d Cir. 1993).

I do not agree with Geske's contention (opening Br. at 46-47) that *Loehmann's Plaza, supra*, is no longer viable for purposes relevant here. Geske relies on the joint motion of the Board and the *Loehmann's Plaza* employers, dated February 3, 1992, to withdraw without prejudice the employers' petition for review and the Board's cross-petition for enforcement in the Court of Appeals for the Sixth Circuit, on the ground that *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), disapproved the Board's analysis of the issue of nonemployee access to private property, *Loehmann's Plaza, supra*, involved a similar issue, the Board applied a similar analysis, and the Board wished to reconsider *Loehmann's Plaza* in light of *Lechmere, supra*. The joint motion to withdraw *Loehmann's Plaza* from the Sixth Circuit was based on the possibility that Lechmere called for reversal of the Board's finding that the picketing and handbilling of the retail store constituted protected activity; nothing in either the joint motion or *Lechmere* suggests that *Lechmere* affected the propriety of the Board's conclusions as to the state court lawsuit if the picketing and handbilling were in fact protected. See *Great Scot, Inc.*, 309 NLRB 548, 549-550 (1992); *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1176-1180 (D.C. Cir. 1993). Nor do I perceive any reasonable basis for Geske's contention (opening Br. at 47-48) that *Loehmann's Plaza* applies only to state court lawsuits regarding trespassing. Indeed, *Loehmann's Plaza* relied partly on *San Diego Building & Construction Trades Council v. Garmon*, 359 U.S. 236 (1959), which found preempted a state court lawsuit directed at peaceful strangers picketing for a union shop agreement, although the picketing was not claimed to be trespassory; see 305 NLRB at 668-669 672 fn. 59.[53]

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[53]In *Loehmann's Plaza, supra*, 305 NLRB at 664, and *Great Scot, supra*, 309 NLRB 548, the state courts had also limited handbilling and/or picketing on public

(continued...)

Neither do I find anything in the language or reasoning of *Loehmann's Plaza* or *Davis* to support Geske's contention (reply Br. at 15-16) that *Loehmann's* is limited to cases where the state court plaintiff had committed unfair labor practices independent of its maintenance of the state court proceeding.[54] Further, I find to be lacking in merit Geske's claim, in Geske attorney Avakian's letter to me dated December 16, 1993, that Davis supports Geske's contention that its state court lawsuit is not preempted by the NLRA. *Davis, supra*, states (1) that the states must defer to the Board's exclusive competence when an activity "is arguably subject to Section 7 of the Act;" and (2) that Federal preemption is triggered, at the very latest, when the General Counsel issues a complaint alleging such Section 7 status. In the instant case, because in March 1992 the General Counsel issued a complaint which alleged that Local 150's picketing was protected by Section 7, *Davis* requires the conclusion that preemption has been triggered with respect to Geske's state court lawsuit based on such picketing. Accordingly, Geske is required by *Davis* and *Loehmann's Plaza* to stay its pursuit of its state court action, claiming that such picketing and related action were defamatory, pending determination in the case at bar of whether the picketing was so protected. An affirmative answer will preclude any state court finding that such picketing constituted actionable defamation under state law; see *Loehmann's Plaza, supra*, 305 NLRB at 669, and cases cited. Geske's contention that it "has no libel remedy at all before the Board" can have relevance only if

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[53](...continued)
property. However, any issues thus presented were not addressed by the Board.

[54]For example, if the General Counsel issued against two respondent companies a complaint which solely alleged that they were joint employers which violated the NLRA by discharging an employee because he distributed a pamphlet allegedly protected by Section 7, the respondent companies admitted that he was discharged for that reason but denied joint-employer status and the Section 7 protection of the pamphlet, and the Board sustained the complaint as to one respondent, *Loehmann's Plaza* would appear to preempt a defamation suit by either company against the employee (and/or a union which provided the pamphlet to him) even if the Board dismissed the complaint with respect to one of the two companies on the ground that it was not a joint employer of the dischargee. Cf. *Austin, supra*, 418 U.S. at 286.

Geske prevails in its contention, as a respondent in the instant unfair labor practice proceeding, that the alleged defamation does not enjoy protection under the NLRA. If Geske does so prevail, Geske will be free to pursue its defamation suit in state court.

Geske filed its state court lawsuit on September 6, 1991, and the General Counsel's initial complaint herein, which established preemption under *Loehmann's Plaza*, did not issue until March 30, 1992. Accordingly, as to the branch (par. 6(f)) of the instant complaint based upon filing, maintaining, and prosecuting a state court lawsuit directed against preempted activity, no violation could have occurred until March 30, 1992. *Loehmann's Plaza, supra*, 305 NLRB at 669-670; see also *Davis Supermarkets, supra*, 2 F.3d at 1178-1180; *Great Scot, supra*, 309 NLRB at 549-550; *Oakwood Hospital*, 305 NLRB 680 (1991), enf. denied on other grounds 983 F.2d 703 (6th Cir. 1993). Therefore, paragraph 6(f) will be dismissed at this point to the extent that this paragraph relies on the filing of the state court lawsuit, and on its maintenance and prosecution before March 30, 1992.

The next question to be considered is whether the subject matter of the state court lawsuit as described in the instant complaint (trade libel, and tortious interference with contractual relations and prospective advantage) included "protected" activity within the meaning of *Loehmann's Plaza*. Contrary to Geske, a negative answer is not required by the absence of evidence that such activities were engaged in by statutory employees. *Loehmann's Plaza, supra*, 305 NLRB at 664, 670-671; *Oakwood Hospital, supra*, 305 NLRB 680; *Johnson & Hardin Co.*, 305 NLRB 690 (1991); *Great Scot, supra*, 309 NLRB 548; see also *K Mart Corp.*, 313 NLRB 50 (1993); *Bristol Farms*, 311 NLRB 437 fn. 6 (1993); *Richards United Super*, 308 NLRB 201 (1992); *Diamond Walnut Growers*, 312 NLRB 61, 68-69 (1993); *Dahl Fish Co.*, 279 NLRB 1084, 1110-1112 (1986), *enfd.* 813 F.2d 1254 (D.C. Cir. 1987); *Giant Food Stores*, 295 NLRB 330 (1989), *reconsideration denied* 298 NLRB 410 (1990). Rather, *Lechmere* stated that Section 7 applies "derivatively" to third parties under certain circumstances, because the employees' right of self-organization depends in some measure on their ability to learn the advantages of self-organization from others; 112 S.Ct. at

845-846. Among the sources of such information to employees may be stranger picketing, which includes an aspect of communication as well as the exercise of other influences.[55] The fact that Section 8(b)(7) (including Section 8(b)(7)(C)) constitutes a legislative adjustment between preventing certain perceived ills and respecting the speech aspects of picketing[56] strongly indicates that organizational and recognitional picketing permitted by these statutory provisions constitutes protected activity as that term is used in *Loehmann's Plaza*. A similar conclusion is at least pointed to, and perhaps required, by *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274 (1960); see also *Austin, supra*, 418 U.S. at 279-280 fn. 14; *NVE Constructors, v. NLRB*, 934 F.2d 1084, 1087 (9th Cir. 1991). Accordingly, I conclude that conduct which constitutes peaceful, primary recognitional and/or organizational picketing within the meaning of Section 8(b)(7), but which is not forbidden thereby or by any other provisions of the NLRA, at least ordinarily constitutes protected activity as that term is used in *Loehmann's*

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[55]See *Hughes v. Superior Court of California for Contra Costa County*, 339 U.S. 460, 464-466 (1950); *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284, 288-295 (1957). As described by Geske attorney Smetana in his oral argument to the state trial court in connection with defendants' motion for a directed finding after Geske had rested, "picketing is speech plus." Geske's appeal to the Supreme Court of Illinois (at 32 of attachment E to Geske's opening Br.) states: "Geske recognizes that peaceful and truthful picketing is an exercise of First and Fourteenth Amendment rights. *Retail Clerks v. J. J. Newberry Co.*, 352 U.S. 987 (1957) [reversing per curiam 298 P.2d 375 (S. Ct. Idaho 1956)]. That alone, however, does not make it immune from regulation."

[56]See generally *Laborers' Local 1184 (NVE Constructors)*, 296 NLRB 1325, 1327 (1989), *affd.* 934 F.2d 1084 (9th Cir. 1991); *NLRB v. Suffolk County District Council of Carpenters (Island Coal)*, 387 F.2d 170, 173-174 (2d Cir. 1967); *Laborers Local 840 (Blinne Construction)*, 135 NLRB 1153, 1156-1159 (1962); *Dayton Typographical Union 57 v. NLRB (Greenfield Printing)*, 326 F.2d 634 (D.C. Cir. 1963); 2 Leg. Hist. 1191(3), 1687(3)-1688(2), 1720(1), 1736(2), 1771(1), 1776(1-2), 1832(1)-1833(2) (LMRDA 1959). (Numbers in parentheses refer to columns.)

Plaza.[57] I would reach this conclusion even if the record supported Geske's contention that at allegedly relevant times Geske employed only one employee who was eligible for membership in Operating Engineers Local 150.[58] See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Plumbers Local 195 (Neches Instruments)*, 221 NLRB 1226 (1975). Moreover, although Local 150's picket signs requested recognition as to Geske's "operating engineer employees," the state court record includes testimony by Mike Geske and Geske witness McKelvey that Bill Rucker (identified as a Local 150 business agent in the state court record and in the testimony taken before me) sought in mid-August 1991 to induce Geske truckdriver McKelvey to join "the union;" and a representation by Teamsters Local 301 Business Agent Layoff to Geske truckdriver Hansen about August 20, 1991 that "they were organizing."[59] In any event, an affidavit sworn to by Lori Geske on September 5, 1991, in connection with the state court proceeding, describes both Schroeders as "employees" who were "loader operators," a job classification within Local 150's jurisdiction as shown by the testimony of Powers, a Local 150 member who was a loader operator for Vulcan; Lori did not seek to correct Geske's counsel when, during her direct

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[57]A similar conclusion was reached by the state appellate court, in reliance on *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 194 fn. 24 (1978). The Court relied on this conclusion in support of the Court's decision that the defendants were conditionally privileged to lawfully interfere with Geske's contractual agreements and prospective economic advantage. As to the weight (if any) to be attached to this conclusion, see infra (part III, V,2).

Such "protected" primary picketing activity includes lawful ambulatory or roving situs picketing; see *Teamsters Local 327 (Coca-Cola)*, 184 NLRB 84, 94 (1970); *NLRB v. Distillery Workers (Adolph Coors)*, 272 F.2d 817 (10th Cir. 1959).

[58]See Geske Attorney Avakian's letter to me dated September 10, 1993, in reply to my letter of inquiry concerning a seemingly garbled footnote, with incomplete citations, in Geske's opening brief. This letter suggests that the date referred to is December 1992, more than a year after the picketing at issue in the instant case.

[59]As discussed infra fn. 60, Geske attaches significance to Local 150's failure to intervene in a representation proceeding instituted by a June 1992 request by another union for a unit of "all employees" and terminating in an election in a unit of truckdrivers, equipment operators, and mechanics.

examination before me on December 4, 1992, he repeatedly referred to the Schroeders as "employees;" and Geske's reply brief (at 23) refers to the Schroeders as "employees."

Furthermore, particularly because Section 8(b)(7) does not distinguish between organizational and recognitional picketing (*Curtis, supra*, 362 U.S. at 291), I would reach the same result even if Operating Engineers Local 150 and Teamsters Local 301 had made no nonpicketing effort to organize Geske's employees. In any event, as noted, the record before the state trial court contains evidence that agents for Locals 150 and 301 used oral persuasion in an effort to induce two Geske truckdrivers to join a union. In addition, Mike Geske testified before the state trial court that in mid or late July 1991, Local 150 Business Representative Delrivero gave his business card to Geske employee Zigfried Teachen. Moreover, the credible evidence adduced before me shows that Lori directed Geske's employees not to talk to Local 150 Business Representative August; and that while Local 150 was admittedly picketing Geske's facility, Lori interrupted a conversation between August and Geske's loader operators (the Schroeders) which she believed to constitute an effort by August to induce the Schroeders to talk to him (supra, part III,F). Furthermore, while Operating Engineers Local 150 was admittedly picketing Geske, August normally came each morning to the Melahn property across the street from the Geske plant, cooked breakfast, met with employees of Geske, and shared breakfast with them. I infer that during these conversations over the period of a month, Local 150 Business Representative August made at least some effort to induce his breakfast companions to join Local 150 or some other union which normally included employees with their job classifications. See also, infra, fn. 60.

The next question to be considered is whether the 1991 picketing herein was unprotected because it allegedly violated Section 8(b)(7)(C). For the reasons stated by the Regional Director (supra, part III,U,6), I find that the 1991 picketing did not violate that statutory provision. I disagree with Geske's contention that the 1991 picketing after September 19, 1991 (Geske's lawsuit was filed on September 5), with signs naming only Laborers Local 1035, was unlawful because such picketing allegedly constituted a continuation

of the picketing which used signs naming only Operating Engineers Local 150, which picketing began on August 19, 1991. In so contending, Geske relies (opening Br. at 11-12) mostly on the presence of Local 1035 officers Bauman and Smith on Local 150's picket line during various days in August and September 1991, sometimes when Local 150 and Local 301 business agents were also present; on Bauman's testimony that he never attempted to interest any Geske employee in joining Laborers' Local 1035 other than through picketing;[60] on Bauman's allegedly unlikely December 1992 testimony that he could not remember certain particulars about the August-September 1991 picketing at Geske; and, apparently, on Bauman's allegedly unlikely explanations (which I have partly discredited), for his presence at the picket line (see supra, part III,U,3). The picketing after September 19 named only Laborers' Local 1035 and laborers. I conclude that the record fails to show that the August-October 1991 picketing constituted a joint venture by Operating Engineers Local 150 and Laborers Local 1035.

As previously found, Geske has from time to time requested the state court to require removal of the Operating Engineers Local 150 pickets irrespective of the message on the signs carried by them (supra, part III,S,U,2), and has continued to prosecute the state court lawsuit after these signs were no longer displayed but Laborers Local 1035 had begun carrying signs whose accuracy Geske does not question. Moreover, I agree with the General Counsel that statutory protection attached to the dissemination of the message conveyed on the signs displayed by Local 150 -- namely, the "Rat

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[60]In so arguing, Geske disregards Local 1035's voluntary participation in a December 1992 multicraft election pursuant to a June 1992 representation petition filed by the Congress of Independent Unions. However, in contending that Operating Engineers Local 150, too, failed to engage in nonpicketing organizational activity during the picketing which was suspended in the fall of 1991, Geske does rely on Local 150's failure to respond to the Regional Office's June 1992 request for a showing of interest as a condition for participating in the December 1992 election. I believe that the 1992 representation case was too remote in time to evidence any organizing action or inaction during the picketing in August and September (and, Geske contends, October) 1991. In any event, employees' perceived lack of interest in unionization does not establish that no organizing effort occurred.

Patrol" sign (accompanied by an inflatable rat) and the signs stating, "IUOE Local 150 on Strike Against Geske for Recognition as Majority Representative of Company's Operating Engineers." The word "rat" was protected by the statute as a pejorative rhetorical term to demonstrate Local 150's strong disapproval of workers who failed to join Local 150 and an employer which did not recognize it (see Austin, supra, 418 U.S. at 282-287). I do not believe that any employee, customer, or supplier of Geske would read this sign, on a truck parked at Melahn's premises across the street from Geske's asphalt plant, as alleging that Geske's asphalt plant -- or, for that matter, Melahn Construction Company's facility -- was infested with rodents in the literal sense; any such interpretation would be difficult to square with the statement in Lori's affidavit of September 6, 1991 (supra, part III,O) that suppliers and customers were "intimidated" by this sign. Nor do I believe that the "IUOE on strike" signs constituted a representation that Geske's employees were on strike, as they were not. Geske's contention that these signs must be read as so asserting, because a union is incapable of striking, is difficult to reconcile with the statutory provisions which forbid "a labor organization . . . to engage in, or to induce or encourage any individual employed by any person . . . to engage in, a strike" for certain objects (Sec. 8(b)(4), emphasis added). Indeed, Geske's August 23, 1991, charges against Locals 150 and 301 alleged that they had violated such provisions by leading "neutrals to believe that the Union is 'on strike'" (supra, part III,H). Moreover, picketing has been equated with striking for the purposes of Section 13 of the Act.[61] *Curtis, supra*, 362 U.S. at 281 fn. 9; *NVE Contractors, supra*, 934 F.2d at 1087. Furthermore, according to Tigger's testimony at the state court trial, when Local 150 Business Representative Quigley told him and a police officer about August 22, 1991, that "We are on strike against Geske's," Lori did not dispute this, but merely told

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[61]"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish the right to strike, or to affect the limitations or qualifications on that right."

Quigley that" it was an illegal strike."[62] Rather, I find that the statement on Local 150's signs constituted a strike signal urging Geske's employees to strike and requesting its customers and suppliers to refuse to cross the picket line.[63]

In view of my finding that the message on the picket signs was not untruthful, I find no merit in Geske's contention that dismissal of the complaint is called for by a memorandum issued by the Division of Advice on February 28, 1985, in Samuel Rappaport Family Partnership, Case 4-CA-14583[64] The subject matter of the state court lawsuit in Rappaport was alleged knowing and malicious misrepresentations to the public (partly through picketing) that the union represented Rappaport's employees; I have found that the picket signs in the instant case did not contain misrepresentations. In any event, advice memoranda do not constitute Board law. *Kysor Industrial Corp.*, 307 NLRB 598, 602 fn. 4 (1992).

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[62]Pease, a customer of Geske's who performed haulage for it when it could not obtain other cartage during the picketing and has had a number of disputes with Local 150, testified at the state court trial to the understanding that "IUOE Local 150 on strike against Pease for recognition as majority bargaining representative of Company's operating engineers" means that Local 150 business agents were on strike against Pease.

[63]No different result is suggested by *Carpenters Local 1849 (Robert Young)*, 208 NLRB 461 (1974), where picketing beyond the 30-day period was claimed to be protected by the 8(b)(7)(C) proviso that the object of the picketing was "truthfully advising the public" that the union did not have a contract with the picketed employer. The Board found that the "strike" language showed the picketing to be directed at employees rather than the public, and that use of these words was untruthful "in this situation" -- namely, a situation where (unlike here) the union was contending that the picketing did not have any representational or organizational object, but, rather, constituted a mere statement directed at the public alone. See *Retail Clerks v. Quick Shop Markets*, 604 F.2d 581, 585-586 (8th Cir. 1979); *Hotel & Restaurant Employees Local 568 (Restaurant Management)*, 147 NLRB 1060, 1067-1068 (1964). Laborers Local 1035 Business Agent Smith testified at the state court hearing that the "On Strike" language on Local 150's picket sign caused him to understand that the picket was organizational.

[64]The copy of this memorandum attached to Geske's opening brief is inaccurate. An accurate copy is attached to a letter from me to counsel dated June 4, 1993, and contained in the formal file in the case at bar.

The requests for injunctive and monetary relief included in Geske's lawsuit in state court were based on complaint allegations of trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage. When considered in connection with the evidence put in by Geske in attempted support of its request for a preliminary injunction, the complaints themselves, and Geske's briefs and other documents filed by it in connection with its complaints, show that each of these allegations is based in material part on recognitional/organizational picketing which I have found to be protected by the Act. Accordingly, I find at this point that Geske violated Section 8(a)(1) by maintaining and prosecuting this lawsuit on and after March 30, 1992, the date on which preemption was triggered. I find without merit Geske's contention in its reply brief (at 14) that the instant complaint must fail because the General Counsel failed to seek relief under Section 10(1), which affords the agency power to proceed against charged persons where there is reasonable cause to believe that they have violated certain statutory provisions (including Sec. 8(b)(4)(A), (B), and (C), Sec. 8(b)(7), and Sec. 8(e)); cf. infra, fns. 65-66. The General Counsel makes no claim that paragraph 6(f) of the instant complaint encompasses any lawsuit by Geske based on any such 8(b) and (e) allegations which the Regional Office found meritorious. Nor is there merit to Geske's seeming contention (opening Br. at 32) that I have no power to find its lawsuit an unfair labor practice because that lawsuit is still pending and (partly because for a period of time that lawsuit was stayed by the state appellate court) the agency sought no relief under Section 10(j) of the Act. See *Bill Johnson's*, supra, 461 U.S. at 747-748; *Loehmann's Plaza, supra*, 305 NLRB at 671-672; *Great Scot, supra*, 309 at 549-550; *Johnson & Hardin, supra*, 305 NLRB at 692. Any contention by Geske that the Board's power to make an unfair labor practice finding is foreclosed by the failure to seek relief under Section 10(j) is inconsistent with the fact that the power to request such relief is discretionary and not mandatory, and with the fact that the propriety of a final order by the Board does not depend on the result of any

10(j) proceeding which may have been brought.[65] Any argument by Geske that the Board's failure to seek 10(j) relief precludes an unfair labor practice finding based on a lawsuit in state court runs contrary to the entire thrust of *Bill Johnson's*; see particularly 461 U.S. at 745-746.[66]

B. *Whether Geske Violated Section 8(a)(1) by Filing, Maintaining, and Prosecuting a State Court Lawsuit with Causes of Action which are Without Reasonable Basis and were Motivated by an Intent to Retaliate Against Operating Engineers Local 150 in Seeking to Organize Geske's Employees by Engaging in Lawful Recognitional Picketing*

In *Bill Johnson's*, supra, 461 U.S. at 744, the Supreme Court held that an employer violates Section 8(a)(1) of the Act by prosecuting a baseless lawsuit with the intent of retaliating for the

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[65]*NLRB v. Acker Industries*, 460 F.2d 649, 651-652 (10th Cir. 1972); *Tall Pines Inn*, 268 NLRB 1392,JD fn. 1 (1984). Similarly, a decision in a proceeding under Sec. 10(1) of the Act does not constitute res adjudicata with respect to a proceeding on the merits under Sec. 10(b),(c),(e), and (f). *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 680-683 (1951).

[66]Geske's opening brief states (at 32)," There is one mechanism . . . alone . . . for the federal government to exercise its Supremacy rights against a sovereign state government. In the NLRA, that mechanism is exercised by invoking the aid of a federal district court under Section 10(j) of the Act, 29 U.S.C. § 160(j). *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)." The Board lawsuit over which *Nash-Finch* upheld the district court's jurisdiction was brought under 28 U.S.C. § 1377; *NLRB v. Nash-Finch Co.*, 434 F.2d 971, 972 (8th Cir. 1970), *reversed and remanded*, 404 U.S. 138 (1971); see *Johnson's supra*, 461 U.S. at 738 fn. 5. Moreover, *Nash-Finch* stated (404 U.S. at 147) that the fact that the Board is given express authority to seek injunctive relief in some sections of the Act, including Sec. 10(j) and (l),," is not persuasive that the Act expresses a policy to bar the Board from enforcing the national interests on other matters." Further, the Supreme Court cited several Board orders issued pursuant to Sec. 10(c) of the Act, some of which were enforced under Sec. 10(e) or 10(f),in support of its statement in *Bill Johnson's*, supra (461 U.S. at 737-738 fn.5) that "we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not be lawfully imposed under the Act."

exercise of rights protected by the Act. Although *Bill Johnson's*, supra, itself involved a lawsuit against employees who themselves engaged in the protected conduct which was allegedly the reason for retaliation, the Board has read *Bill Johnson's*, supra, as extending to a lawsuit filed against a union in retaliation for its having filed charges with the Board;[67] to criminal complaints filed against non-employee organizers in retaliation for their distribution of union literature on public property;[68] and to a baseless libel lawsuit filed against a union in retaliation for the strike activity of the union's members;[69] see also *Bristol Farms, supra*, 311 NLRB 437 (employer violated Sec. 8(a)(1) by threatening to arrest nonemployee union agents who were exercising right under state constitution to handbill and picket on private property). *Postal Service*, 275 NLRB 360, 361-362 (1985), relied on by Geske (opening Br. at 34), held that a threat by the respondent employer's temporary supervisor to sue the union, motivated by the union's action in filing grievances alleging that the employer was giving her improper preference in her capacity as an employee, did not violate Section 8(a)(1) because that threat was not attributable to the employer, as particularly shown by the fact that the threat did not involve a form of retaliation within the framework of her supervisory responsibilities. I conclude that *Bill Johnson's*, supra, supports the proposition that an employer violates Section 8(a)(1) by filing, maintaining, and prosecuting a baseless lawsuit against a union in retaliation for its protected recognitional/ organizational picketing.

Furthermore, I find that Geske's lawsuit against Locals 150 and 301 and their at least alleged agents was baseless. In so finding, I rely mostly on the determination of the state judge who conducted the state court trial that Geske had failed to establish likelihood of success on the merits, and on the action of the state appellate and supreme courts in denying Geske's interlocutory appeal. I note,

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[67] *Dahl Fish Co., supra*, 279 NLRB at 1110-1112; see also *Giant Food Stores, supra*, 295 NLRB at 333-334.

[68] *Johnson & Hardin, supra*, 305 NLRB 690.

[69] *Diamond Walnut, supra*, 312 NLRB at 68-69.

moreover, Geske's representation to the Illinois supreme court, in support of Geske's motion for a stay of mandate, that " there is little likelihood that the Circuit Court will act other than to dismiss [and] almost no likelihood that the Second District [appellate court] would reverse such a dismissal" (supra, part III,U,11). In addition, Geske lost its appeal before the state appellate and state supreme courts after successfully obtaining a stay of further proceedings in the trial court upon the representation that the appellate court's decision on the issues appealed from" will determine, to a large degree, the course of future litigation in the trial court," and that issues which would continue to be litigated absent the stay" will ultimately be determined by the decision of the Appellate Court" (supra, part III, U,). Moreover, Geske's petition to the Supreme Court of Illinois (Geske's opening Br. attachment E) states that Geske's claims of tortious interference stand or fall with the claim of trade libel (at 30).[70] Geske's reply brief in support of its successful petition to the Supreme Court of the United States for certiorari (which reply brief Geske's counsel forwarded to me) states (at 9 fn. 6)," the overriding reason why the Court should grant review at this time is that the tort of trade libel is the only available remedy to deal with untruthful statements meeting the *New York Times, supra*, standard placed on a picket sign. If certiorari should be denied the law of this case will prevent the *Linn-Lowe-New York Times* standard from being applied in view of the decision of the Second District below." Further, up to this point, Geske's only judicial victory in state court has been obtaining a temporary restraining order from Judge Pitluck at an ex parte hearing, without (as Geske counsel must have known) any real opportunity for defendants' counsel to attend, and entirely on the basis of three affidavits (including one from Senior, who did not testify before either Judge Sullivan or me), which order was extended by Judge Sullivan largely on the ground that the hearing on Geske's motion for a preliminary injunction had not yet been completed; as previously noted, that motion was denied upon Geske's resting its case. No reason to discount the state courts'

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[70]In addition, that petition states (at 17-18) that the unions' allegedly false signs and alleged misrepresentations' may not fit under [the] constrained rubric" of *Vee See, supra*, 79 Ill. App. 3d 1084, 35 Ill. Dec. 444, 399 N.E. 2d 278 -- although the petition later contends (at 20-21) that *Vee See's* standards were in fact met.

conclusions is suggested to me by my review of the state court transcript of testimony and the various briefs and other documents which are part of both the state court record and the record before me.

As to the Illinois appellate court's ruling, it may be appropriate to discuss at this point the role which it should play in the case before me. Geske's counsel avers (see motion dated July 13, 1993) that I had been" improperly" informed of the appellate court's decision" that was not published and in which Local 150 was denied their motion to publish same even though they argued to the [appellate court] that it was a key precedent and important to cite in the future.[71] This ruling of the Illinois Appeals Court . . . made it impermissible to cite this case or more importantly its ruling and its rationale."[72] The ruling referred to by Geske denied a "Motion by defendants -appellees pursuant to [Illinois] Supreme Court Rule 23, to change the decision from an unpublished order to a published opinion." Rule 23 states, in part:

> A case shall be disposed of by opinion when a majority of the panel deciding the case determines that (1) the case involves an important new legal issue or modifies or questions an existing rule of law; or (2) the decision considers a conflict or apparent conflict of authority within the appellate court.

Accordingly, the appellate court's denial of defendant's motion means, at the very least, that the appellate court did not regard Geske's unsuccessful lawsuit as the kind of case described in the quoted material. Rule 23 further states that "orders" (that is, those

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[71]Although no copy of the motion has been tendered to me, Local 150 has not represented to me that Geske's summary of it is inaccurate.

[72]The appellate court's "Order" was received into evidence before me as J. Exh. XII-29 on December 3, 1992. On that date, the parties stipulated that this document was the order in question, but "By entering into this stipulation, no party has agreed to the materiality or relevance of the matters which are the subject of the stipulation, and each party reserves the right to raise arguments regarding materiality and relevance in the presentation of its case, in briefs." This language aside, I can see nothing in the stipulation which would limit in this proceeding the use of the decision in question.

issued without a published opinion, such as the appellate court's order in Geske's state court lawsuit)

> are not precedential and will not be published. They may be invoked, however, to support contentions such as double jeopardy, res judicata, collateral estoppel, or the law of the case.

I conclude that in considering whether Geske's lawsuit was baseless, I am permitted by this rule to consider the appellate court's statement that Judge Sullivan's decision was not reversible on appeal because it was not against the manifest weight of the evidence, and, moreover, that the picket signs were not of a libelous nature. See *Bradley v. Howard Hembrough Volkswagen*, 89 Ill. App. 3d 121, 44 Ill. Dec. 413, 411 N.E. 2d 535, 537 (App. Ct. Ill., 4th Dist. 1980); *International Association of Firefighters, Local #23 v. City of East St. Louis*, 213 Ill. App. 11, 157 Ill. Dec. 179, 571 N.E. 2d 1198, 1199-1200 (App. Ct. Ill., 5th Dist., 1991). In any event, my conclusion of baselessness would remain the same even disregarding this latter statement.

Because Federal reviewing authority may wish to review the evidence submitted by Geske to the state court, that evidence, however, has been tediously summarized above. Because Geske has at all times primarily requested injunctive relief (on one occasion, on an "emergency" basis), and because since March 1992, the General Counsel has been seeking in the instant proceeding an order requiring Geske to withdraw much of its state court lawsuit, as to the state court complaint in its present form I give little credence to Geske counsel's repeated assertions (supra, fn. 4, opening Br. at 15, reply Br. at 3, 12) that after final disposition of its heretofore unsuccessful efforts to obtain a preliminary injunction (such final disposition presumably having occurred when certiorari was denied by the Supreme Court of the United States), Geske intends to introduce in support of its state court lawsuit a significant amount of evidence which counsel failed to present to me during the December 1992 hearing in the instant case or, up to this point, to the state courts in connection with Geske's lawsuit.

In addition, I find that Geske brought this action in retaliation for the protected organizational/recognitional picketing. Thus, the subject matter of the lawsuit consisted, in significant part, of the protected picketing. Lori Geske sought to use the temporary restraining order as a means of procuring the removal of all the pickets, although the order did not so require (supra, part III,O). Geske's counsel filed a motion on September 6, 1991, with the state trial court requesting the amendment of the temporary restraining order so as to in effect ban all picketing of Geske's facilities or trucks, although counsel was admittedly aware that Geske had no legal right to an injunction banning all picketing (supra, part III,S; see also part III,U,2). Shortly after the picketing began, Lori Geske asked Local 150 Representative August whether any Geske employee had signed anything with him; said that she had directed the employees not to even talk to him; told him to "get out of here," that he had no right to stand outside Geske's facility; and then removed, and threw across the street, a picket sign which Local 150 had put into ground not owned by Geske (supra, part III,F). On the following day, Mike Geske took such a sign from ground not owned by Geske and, when returning the sign to August, raised his middle finger (supra, part III,G,1). Further, Tigger Geske sought on September 7, 1992, to use the temporary restraining order as a means of compelling Vulcan employee Powers to load a Geske truck, although the order did not so require (supra, part III,P); and, on August 29, 1991, earnestly asked representatives of Local 150 and 301 what Geske would have to do to take the pickets down and described the persons who were responsible for the picketing and getting the union in as "worthless buttholes" who were going to "get theirs" (supra, part III,K). I find that such remarks and conduct by Mike and Tigger are probative of Respondent Geske's motive for the lawsuit, in view of the August 29 statements of General Manager Lori Geske (admittedly an agent of Geske) to representatives of Locals 150 and 301 that instead of meeting with Geske President Senior (also admittedly an agent of Geske) they would have to meet with Lori (Senior's daughter), Tigger (Senior's son), and Mike (Senior's nephew and the son of the vice president and a half-owner of Geske); in view of Lori's failure to repudiate her brother Tigger's remarks, most of which were made in her presence; and in view of the fact that Mike's conduct showing disdain for the picketing

virtually duplicated the conduct of his first cousin, Lori , the previous day. See *Panelrama Centers*, 296 NLRB 711, 713 (1989). Finally, Larry Geske (the vice president and a half-owner of Geske) testified that he "would think" he did not want the Union to represent his employees.

For the foregoing reasons, I find that Geske violated Section 8(a)(1) of the Act by filing a state court lawsuit against Operating Engineers Local 150 and Teamsters Local 301 about September 5, 1991; by filing an amended complaint in state court against them and Chuck August, Robert Paddock, Gary Laney, Michael Quigley, Kal Lester, Angel Delrivero, Bud Layoff, and Mike Haffner about September 27, 1991; and by maintaining and prosecuting this September 5 and 27 lawsuit; which lawsuit included certain causes of action which are without reasonable basis and were motivated by an intent to retaliate against the protected concerted activity of Operating Engineers Local 150 in seeking to organize Geske's employees by engaging in lawful recognitional picketing. "Although it is not unlawful under the Act to prosecute a meritorious action . . . suits based on insubstantial claims . . . are not within the scope of First Amendment protection." *Bill Johnson's*, supra, 461 U.S. at 743.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local 150, AFL-CIO and Chauffeurs, Teamsters and Helpers, Local 301 are each labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by engaging in the following conduct.

(a) On and after March 30, 1992, by maintaining and prosecuting a state court lawsuit against Local 150, Local 301, and their

alleged agents, with causes of action that are preempted by the Act and include conduct protected by the Act.

(b) On and after September 5, 1991, by filing, maintaining, and prosecuting a state court lawsuit against Local 150, Local 301, and their alleged agents, with causes of action which are without reasonable basis and were motivated by an intent to retaliate against Local 150's protected concerted activity in seeking to organize Respondent's employees by engaging in lawful recognitional picketing.

4. The unfair labor practices set forth in Conclusion of Law 3 affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act prior to March 30, 1992, by filing, maintaining, and prosecuting a lawsuit against Local 150, Local 301, and their alleged agents, with causes of action that are preempted by the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom and from like or related conduct affirmatively, Respondent will be required to file a motion with the state trial court for leave to withdraw its unlawful lawsuit to the extent it includes allegations directed against Local 150, Local 301, and their alleged agents, in the third amended complaint or its predecessors. In addition, as requested in the General Counsel's posthearing brief, Respondent will be required to reimburse the defendants in that lawsuit for all legal expenses incurred in the defense of such allegations, to date and in the future, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); *Davis Supermarkets, supra*, 306 NLRB 426, enfd. 2 F.3d 1162 (D.C. Cir. 1993); *Great Scot, supra*, 309 NLRB at 550; *Diamond Walnut Growers, supra*, 312 NLRB at 71. I find this reimbursement order appropriate because the entire lawsuit grounded on the first amend ed, second amended, and third amended complaints was baseless

under state law and was filed and maintained in state court for retaliatory purposes, even though the lawsuit included certain causes of action which were not preempted[73] and which might have constituted a reasonable basis for a damage suit before a Federal district court under Section 303 of the Act. I note that Geske successfully opposed the defendants' efforts to remove Geske's lawsuit to Federal district court (supra, part III,S) and, the day after the Federal district court granted Geske's motion to remand the case to state court, amended its complaint to seek merely "financial relief incidental to injunctive relief," which injunctive relief it could not have obtained under Section 303. I would be empowered to issue such a reimbursement order even if the General Counsel's posthearing brief had not thus altered the reimbursement request set forth in the complaint in its final form, which complaint requested a reimbursement order "except to the extent that . . . fees and expenses were incurred solely in defense of [Geske's] claim for damages against Operating Engineers Local 150 and Teamsters Local 301 under authority of Section 303 of the Act." *Kaumagraph Corp.*, 313 NLRB 624 (1994); *Sinclair Glass Co.*, 188 NLRB 362, 363 (1971), *enfd.* 465 F.2d 209 (7th Cir. 1972); *Government Employees Local 888 (Bayley-Seton)*, 308 NLRB 646 fn. 2 (1992). In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[74]

ORDER

The Respondent, Geske and Sons, Inc., Crystal Lake, Illinois, its officers, agents, successors, and assigns, shall

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[73]See *Summitville Tiles*, 300 NLRB 64 (1990); *Bill Johnson's*, supra, 641 U.S. at 747-748.

[74]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Maintaining and prosecuting lawsuits with causes of action that are preempted by the Act and include conduct protected by the Act.

(b) Filing, maintaining, or prosecuting lawsuits with causes of action which are without reasonable basis and are motivated to retaliate against activity protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) File a motion for leave to withdraw its lawsuit docketed in the Circuit Court of McHenry County Nineteenth Judicial District, State of Illinois, as No. 91-CH-273, *Geske & Sons, Inc. v. International Union of Operating Engineers Local No. 150, et al.*, to the extent that this lawsuit includes allegations in the third amended complaint or its predecessors.

(b) Reimburse the following defendants in that lawsuit for all legal expenses incurred in connection with such allegations, to date and in the future, plus interest as described in the remedy section of this decision: International Union of Operating Engineers, Local 150, AFL-CIO; Chauffeurs, Teamsters and Helpers Local 301; Chuck August; Robert Paddock; Gary Laney; Michael Quigley; Kal Lester; Angel Delrivero; Bud Layoff; and Mike Haffner.

(c) Post at its facilities in Crystal Lake, Illinois, copies of the attached notice marked "Appendix."[75] n75 Copies of the notice, on

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[75]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of

(continued...)

forms provided by the Regional Director for Region 33, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Paragraph 6(f) of the complaint is dismissed with respect to conduct prior to March 30, 1992.

Dated at Washington, D.C. February 24, 1994

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[75](...continued)
Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain or prosecute lawsuits with causes of action that are preempted by the Act and include conduct protected by the Act.

WE WILL NOT file, maintain, or prosecute lawsuits with causes of action which are without reasonable basis and are motivated to retaliate against activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL file a motion for leave to withdraw the complaint and amended complaints which we filed against defendants Operating Engineers Local 150; Chauffeurs, Teamsters and Helpers Local 301; Chuck August; Robert Paddock; Gary Laney; Michael Quigley; Kal Lester; Angel Delrivero, Bud Layoff; and Mike Haffner, to the extent that such complaints include allegations contained in the third amended complaint and its predecessors.

WE WILL reimburse these defendants in that lawsuit, with interest, for all legal expenses incurred in connection with such allegations, to date and in the future.

GESKE AND SONS, INC.

No. 2-91-1169

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

This Order Is Not Precedential
And Is Not To Be Cited

GESKE & SONS, INC.,	) Appeal from the Circuit Court
	) of McHenry County.
Plaintiff-Appellant,	)
	)
v.	) No. 91-CH-273
	)
INTERNATIONAL UNION	)
OF OPERATING ENGINEERS,	)
NO. 150; CHUCK AUGUST,	)
et al.,	) Honorable
	) Michael J. Sullivan
Defendants-Appellees.	) Judge, Presiding.

ORDER

The plaintiff, Geske & Sons, Inc., appeals from a September 27, 1991, directed finding by the trial court for the defendants, the International Union of Operating Engineers Local No. 150 and Chauffeurs, Teamsters and Helpers Local Union No. 301, denying the plaintiff's requested injunctive relief. The plaintiff argues on appeal that (1) the court used the wrong corporate libel standard; (2) the court's finding that the "on strike" language on the picket signs did not assail the plaintiff's business methods or financial condition was against the manifest weight of the evidence; (3) the court's finding that there was no tortious interference with contractual relations and prospective advantage was against the manifest weight of the evidence; and (4) the court erred in finding that the Illinois Anti-Injunction Act (Ill. Rev. Stat. 1991, ch. 48, par. 2 (a)) barred injunctive relief.

The plaintiff is a corporation engaged in the business of asphalt paving and the manufacture of asphalt mix for sale to commercial customers. The plaintiff is an open shop employer and its employees are not represented by any labor union. The defendants are labor organizations that represent operating engineers of heavy excavating and earth moving equipment and drivers who haul material.

On September 5, 1991, the plaintiff filed both its original and its amended verified complaints for a temporary restraining order, for preliminary and permanent injunctions, and for damages against the defendants. The plaintiff alleged that the defendants had committed trade libel against it by picketing at the plaintiff's plant with false "on strike" signs. Additionally, the plaintiff alleged that the defendants committed tortious interference with contractual relations and tortious interference with prospective economic advantage by interfering with the loading and unloading of material and threatening and intimidating customers who attempted to conduct business with the plaintiff.

On September 5, 1991, the plaintiff obtained a temporary restraining order against certain alleged conduct by the defendants. On September 6, 1991, the defendants filed a petition of removal to the United States District Court for the Northern District of Illinois. In their petition, the defendants asserted that the plaintiff alleged cognizable claims under federal law, or, alternatively, against conduct protected by the National Labor Relations Act (NLRA)(29 U.S.C. 151, et seq. (1982)). The federal court remanded the plaintiff's complaint, concluding that the complaint did not contain a federal claim and was, therefore, not subject to removal.

On September 12, defendant Local 150 moved to dismiss the plaintiff's claims on the ground that the claims were preempted by federal law or, alternatively, that the Illinois Anti-Injunction Act (Ill. Rev. Stat. 1991, ch. 48, par. 2(a)) precluded injunctive relief. After hearing oral argument on September 16, 1991, the court denied Local 150's motion to dismiss, and stated that the issue of the Anti-Injunction Act was premature.

On September 27, 1991, after an evidentiary hearing, where the plaintiff presented approximately 18 witnesses, the court granted a directed finding for the defendants pursuant to section 2-1110 of the Code of Civil Procedure (Ill. Rev. Stat. 1991, ch. 110, par. 2-1110). The plaintiff appeals from that directed finding.

The following pertinent testimony underlies the plaintiff's claims against the defendants. On August 19, 1991, the defendants' picketers stationed themselves in front of the plaintiff's asphalt plant with picket signs. The signs stated that "I.U.O.E. Local 150 On Strike against Geske For Recognition As Majority Bargaining Representative of Company's Operating Engineer Employees." The "on strike" language was in large bold red letters while the balance of the words on the signs were handwritten in a fraction of the "on strike" size.

On that same date, two of plaintiff customers, Performance Paving and All American Asphalt Maintenance (All American) attempted to obtain asphalt from the plant. When Performance Paving pulled a truck up to the plant, the picketers stood in front of the truck and stated to the driver, "Geske employees are on strike, why don't you go to [Geske's competitor]." The driver turned around and left the plaintiff's plant without asphalt. The same statement was made by a picketer to All American drivers, and to its owner. Some picketers held up lit lighters and told an All American driver that they knew where he parked his truck in Mundelein. The All American drivers left the plant without hauling any asphalt.

The picketers also followed those trucks that crossed their picket lines. There was testimony that the picketers sometimes drove several feet behind the trucks, at up to 55 miles per hours. Also, there was testimony that the picketers drove very closely both in front and behind the loaded trucks. There was also testimony describing various intimidating behavior on the part of the picketers, and threats made to customers that if they used the services of the plaintiff, they too would be picketed by the defendants.

The plaintiff alleges that as a result of the picketers' unlawful activities, 60% of the plaintiff's regular credit customers now refuse

to do business with it. Additionally, the plaintiff asserts that its aggregate and cartage suppliers now refuse to do business with the plaintiff.

The defendants argue, at the outset, that the Plaintiff's claims for injunctive relief are preempted by section 8 of the National Labor Relations Act (NLRA) (29 U.S.C. 158 (b)(7)(1982)). This provision requires preemption whenever conduct complained of is "arguably subject" to the jurisdiction of the National Labor Relations Board (NLRB). (*Lowe Excavating Co. v. International Union of Operating Engineers Local No. 150* (1989), 180 Ill. App. 3d 39, 44). However, there is an exception to preemption when the State's interest outweighs any peripheral federal concern or "where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that, in absence of compelling congressional direction, we could not infer the Congress had deprived the States of the power to act." (*Lowe*, 180 Ill. App. 3d at 45, citing *San Diego Building Trade Council, Millmen's Union, Local 2020 v. Garmon* (1959), 359 U.S. 236, , 3 L.Ed.2d 775, , 79 S. Ct. 773, .) Restated, if the risk of interference by State involvement is minimal and the activity in question is only a peripheral concern of the NLRB, the matter is not preempted, and the State may proceed. *Lowe*, 180 Ill. App. 3d at 45.

The United States Supreme Court, in the case of *Linn v. United Plant Guard Workers of America, Local 114* (1966), 383 U.S. 53, __, 15 L.Ed.2d 582, __, 86 S.Ct. 657, __, specifically held that the State's interest in redressing malicious libel is so deeply rooted in local feeling and responsibility that it fits within the exception specifically carved out by *Garmon*, and that such claims are therefore not preempted. See also *Fisher v. Illinois Office Supply Co.* (1984), 130 Ill. App. 3d 996, 999-1000; *Krasinski v. United Parcel Service, Inc.* (1988), 124 Ill. 2d 483, 493-94.

The defendants argue on appeal, that in contrast to ordinary libel actions, the plaintiff in the case at bar is asking the State court to determine whether the defendants falsely picketed by merely "implying" that its employees were on strike, thus injecting the court directly into the merits of a labor controversy. However, the

underlying issue in this case is not whether the defendants are entitled to picket, thereby forcing the employees or employers to recognize the defendants as a bargaining representative, but rather whether the defendants committed trade libel. These issues are only of peripheral concern to the NLRB. (See *Krasinski*, 124 Ill. 2d at 493.) We therefore find that this cause of action fits into the exception carved out by *Garmon* and therefore, we find that we are not preempted by the jurisdiction of the NLRB.

We next address the merits of the plaintiff's arguments on appeal. Pursuant to section 2-1110 of the Code of Civil Procedure (Ill. Rev. Stat. 1991, ch. 110, par. 2-1110) in all cases tried without a jury, a defendant may, at the close of the plaintiff's case, move for a directed finding. (*Dyduch v. Crystal Green Corp.* (1991), 221 Ill. App. 3d 474, 477.) In ruling on a motion for a directed finding, the court must first determine if the plaintiff has presented a *prima facie* case and enter judgment for the defendant if the plaintiff has failed to do so. (*Dyduch*, 221 Ill. App. 3d at 477.) If a plaintiff has presented a *prima facie* case, the court must weigh the evidence, including any favorable to the defendant, pass on the credibility of the witnesses, draw reasonable inferences and generally consider the weight and quality of the evidence. *Dyduch*, 221 Ill. App. 3d at 477.) The decision of the trial court to grant a defendants' motion for a directed finding will not be reversed on review unless it is against the manifest weight of the evidence. *Dyduch*, 221 Iil. App. 3d at 477.

In order to obtain preliminary injunctive relief, the trial court must determine, among other factors, the likelihood that the plaintiff will succeed on the merits of the claim. (*Handy Andy Home Improvement Centers, Inc. v. American National Bank and Trust Co.* (1988), 177 Ill. App. 3d 647, 652.) In the case at bar, the trial court denied the preliminary injunction on the basis of this consideration; it found that the plaintiff had little likelihood of success on the merits of its claims.

In the court's determination of the plaintiff's likelihood of success on the merits of its libel claim, the court applied the test for corporate trade libel set forth in *Vee See Construction Co. v. Jenson*

and Halstad, (1979), 79 Ill. App. 3d 1084, 1088. The court noted that the *plaintiff* argued that this was the proper standard to use in the instant case. The standard in *Vee See* requires that "the statements allegedly defaming the plaintiff in its trade or business must assail the corporation's financial position or business methods, or accuse it of fraud or mismanagement." (*Vee See*, 79 Ill. App. 3d at 1088-89.) The court found that the "on strike" signs and any reasonable extension of what the signs read could not be thought to assail the corporation's financial position or its business methods, nor did it accuse the plaintiff of any type of fraud or mismanagement.

The plaintiff argues, for the first time on appeal, that the court applied the wrong trade libel standard, asserting that the court should have applied the standard of malice or reckless disregard for the truth as set forth in *Lowe Excavating Co. v. International Union of Operating Engineers Local 150* (1989), 180 Ill. App. 3d 39, 47-48. The plaintiff argues that this libel standard should apply here because the trade libel alleged in this case is in a "labor context" as opposed to a traditional corporate context.

In *Lowe*, a plaintiff employer sued a defendant union to enjoin the defendant from picketing with placards that purportedly contained false statements. (Lowe, 180 Ill. App. 3d at 43.) The sole issue in front of the *Lowe* court was whether the trial court's determination of federal preemption was proper. (*Lowe*, 180 Ill. App. 3d at 43.) In explaining why the issue in that case was only of peripheral concern to the NLRB, but of great concern to the State, thereby precluding preemption, the court stated in *dicta* that the issue facing the lower court was not a labor law question, but "whether the defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth." *Lowe*, 180 Ill. App. 3d at 47-48.

The Illinois Supreme Court has stated that the precedential scope of a decision is limited to the facts before the deciding court. (*Board of Trustees of Police Pension Fund v. Illinois Human Rights Comm'n* (1986), 141 Ill. App. 3d 447, 455.) General expressions in a court's opinion which go beyond what is necessary to decide a

case are entitled to respect; however, such expressions are not binding authority. *Board of Trustees*, 141 Ill. App. 3d at 456.

When read in context, the *Lowe* court's comment did not define a new standard by which to judge a libel action brought by a corporation. The court merely inartfully attempted to point out that the issue in the lower court did not require interpretation of a labor dispute controlled by federal law, but only a determination of whether the picket signs constituted libel. The case law pertaining to libel, where the plaintiff is a corporation, is clear: the alleged defamation must assail the corporation's financial position, business methods, or accuse it of fraud or mismanagement. See *Harris Trust & Savings Bank v. Phillips* (1987), 154 Ill. App. 3d 574, 579; *American International Hospital v. Chicago Tribune* (1985), 136 Ill. App. 3d 1019, 1025; *Audition Division, Ltd. v. Better Business Bureau* (1983), 120 Ill. App. 3d 254, 256; *Vee See*, 79 Ill. App. 3d at 1088-89.

The plaintiff argues that even if the Vee See standard of libel is used, the court' s finding that the picket signs did not constitute libel was against the manifest weight of the evidence. The plaintiff further argues that if *Vee See* is the proper standard, it should be more liberally applied because this case is in a labor context.

We find that the *Vee See* standard was proper in this case because the plaintiff was a corporation. We also are not convinced by the plaintiff that the *Vee See* standard should be interpreted differently because this is a labor context. Lastly, we do not find that the court's determination, that the "on strike" signs were not libelous, was against the manifest weight of the evidence. See *Dyduch*, 221 Ill. App. 3d at 477.

The plaintiff next argues that the court's finding that the defendants did not tortiously interfere with its contractual relations and prospective economic advantage was against the manifest weight of the evidence. The plaintiff notes the court's finding that the evidence established that there was a certain level of interference by the defendants, but that the interference was not wrongful, unlawful, or violent. The plaintiff, however, asserts that there is no require-

ment that tortious interference be unlawful, wrongful or violent to constitute a tort, and that the defendants tortiously interfered with it by the "misrepresentations" on their signs and by harassing the plaintiff's customers. The defendants argue that their conduct of "recognitional picketing" is protected, and is, therefore, not unjustified or wrongful.

The court found that there was no significant evidence of any unlawful trespass on the part of the defendants, that the defendants were not doing any unlawful act by following trucks that left the plaintiff's plant, and that stopping customer trucks to talk to drivers did not constitute wrongful interference. The court also found that there was no evidence of threats of violence to any person.

In an action for tortious interference with prospective economic advantage, the plaintiff must prove (1) his reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference. (*Fellhauer v. City of Geneva* (1991), 142 Ill. 2d 495, 511.) The elements for an action of tortious interference with contractual relations are similar. They require that the plaintiff establish, as a substitute for the third element, that the defendant intentionally and without justification induced a breach of contract; and they [sic] adds an additional element of "a subsequent breach by the third party caused by the defendant's wrongful conduct." *Certified Mechanical Contractors v. Wight & Co.* (1987), 162 Ill. App. 3d 391, 398.

The law recognizes that in many cases, a third party may be privileged to interfere with existing contractual relations (*Certified Mechanical*, 162 Ill. App. 3d at 400), and to interfere with a prospective economic advantage (see *Fellhauer*, 142 Ill. 2d at 512). A third party is conditionally privileged when acting to protect a conflicting interest that is considered, under the law, to be of equal or greater value than the plaintiff's rights. However, the third party's acts must be legal and must not be unreasonable under the circumstances. (*Certified Mechanical*, 162 Ill. App. 3d at 400.) If

conduct of a third party is conditionally privileged, the plaintiff must prove actual malice; the plaintiff must, then, establish that the defendant acted with a desire to harm which was unrelated to the interest that he was presumably seeking to protect. *Certified Mechanical*, 162 Ill. App. 3d at 401.

In the instant case, the activity of the defendant labor unions, namely, limited recognitional picketing, is protected by the NLRA. (See 29 U.S.C. 157-158 (1982); *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters* (1978), 436 U.S. 180, 194 n.24., __ L Ed. __, __ S.Ct. __) Also, a conditional privilege to lawfully interfere exists where a union is acting on behalf of its members. (See *Santucci Construction Co. v. Baxter & Woodman* (1987), 151 Ill. App. 3d 547, 554 citing *Connaughton v. Gertz* (1981), 94 Ill. App. 3d 265, 270.)

The situation alleged here does not present an instance of "outsiders intermeddling maliciously in the contracts or affairs of other parties." (*Fellhauer*, 142 Ill. 2d at 513.) Here, the defendants were acting on behalf of its members, to unionize the plaintiff's workplace. The defendants' "on strike" signs were not of a libelous nature, and cannot be the basis of a tortious interference claim. Furthermore, activities of the picketers were peaceful and lawful.

Taking the above factors into consideration, we find that under the circumstances the labor union was conditionally privileged to lawfully interfere with the contractual agreements and prospective economic advantage of the plaintiff. (*Certified Mechanical*, 162 Ill. App. 3d at 400-401.) Additionally, we do not find sufficient evidence in the record of actual malice on the part of the defendants to vitiate their conditional privilege. (*Certified Mechanical*, 162 Ill. App. 3d at 401.) For the above reasons, we do not find that the court's determination that the defendants were not guilty of tortious interference with contractual relations and prospective economic advantage was against the manifest weight of the evidence. *Dyduch*, 221 Ill. App. 3d at 477.

The parties also address the issue of whether the cause of action is barred by the Illinois Anti-Injunction Act (Ill. Rev. Stat. 1991, ch.

48, par. 2(a)). We do not address this issue, as we affirm the court's dismissal on other grounds.

For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

Affirmed.

GEIGER, J., with UNVERZAGT and WOODWARD, JJ., concurring.

CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT

STATE OF ILLINOIS)
COUNTY OF MCHENRY) SS

GEN. NO. 91 CH 273
☐ Jury ☒ Non-Jury

GESKE & SONS, INC., pltf.

vs.

IUOE LOCAL 150, and TEAMSTERS Local 301

FILED
McHENRY COUNTY, ILLINOIS
SEP 27, 1991
VERNON W. KAYS, JR.
CLERK OF THE CIRCUIT COURT

Date 9/27/91 Plaintiff's Gerard C. Smetana Defendant's Dale D. Pierson
Attorney David LeSeur Attorney Harold McKenney

ORDER

This matter coming to be heard upon Defendants' Motion to find in their favor under § 2-1110 at the close of Plaintiff's evidence in support of their Motion for Preliminary Injunction, and the Court being fully advised, it is hereby ORDERED that for the reasons stated in open court Defendants' Motion is granted, and Plaintiffs' Motion for Preliminary Injunction is denied.

Plaintiff's motion, subsequent to the court's denial of Motion for Preliminary Injunction, to file 3d Amended Complaint, is granted, and it may be filed instanter.

Prepared by: Dale D. Pierson
Attorney for: IUOE, Local 150
Attorney Registration No. C000200 Judge /s/ Michael J. Sullivan

S.28931

STATE OF ILLINOIS)
)
COUNTY OF MCHENRY)

IN THE CIRCUIT COURT FOR THE NINETEENTH JUDICIAL CIRCUIT MC HENRY COUNTY, ILLINOIS

GESKE & SONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 91-CH-273
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 301,	)	
	)	
Defendants.	)	

REPORT OF PROCEEDINGS had and testimony taken at the trial of the above-entitled cause, before the Honorable Michael J. Sullivan, Judge of said Court, at the McHenry County Government Center, 2200 North Seminary Avenue, Woodstock, Illinois, on the 27th day of September, A.D. 1991, at the hour of 10:00 o'clock a.m.

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THE COURT: I apologize for being a little later than I said, but there was more stuff here to read than I thought at the time; and while counsel, you know, deal in the labor vineyard all the time, it is not something that the Court necessarily does.

The Court had to consider your arguments and really figure out what it is doing and why it is here today and what the purpose of this proceeding is.

We are here and the Court has been hearing testimony with regard to a preliminary injunction that was entered previously in this case.

The Court has heard testimony on behalf of the plaintiff. The plaintiff has rested, and we are here now on the defendants' motion for a directed verdict or a directed finding at the end of the plaintiff's case.

As has been pointed out previously, there is a provision under the Code of Civil Procedure of the State of Illinois involving motions in non-jury cases, to find for defendant at the close of the plaintiff's evidence. It's Section 2-1110.

And the section of the statutes says, "In ruling on the motion, the Court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence."

The action that is before the Court on the complaint, the complaint as amended by the plaintiffs, seeking injunction, injunctive relief and other ancillary relief, basically, on three bases, three different counts of tort in the State of Illinois, 1, trade libel, on the other tortious interference with prospective economic advantage and the tortious interference with economic advantage, present tense.

There has been mention before by both parties of an earlier case deciding in the Second Appellate District, in which myself as presiding judge was involved, and one of the parties, the Local 150. The present plaintiff, Geskes, were not involved, but counsel Smetana and Pierson were involved, that being the Lowe, L-o-w-e, Excavating Company versus Local 150.

But for the change of parties, to a certain extent, this matter before the Court is how [sic] revisited, only Part 2.

In that case, this Court granted -- I don't remember the exact nature of the motion -- but I think a motion finding that the activities that were being conducted at that time were preempted by federal law or regulations; and then that matter went to the Second District Appellate Court, from whence it was reversed and remanded; and I know, I think one or both counsel had told me it went elsewhere; but, in any event, we are here with regard to the findings of the Second District Appellate Court.

In that case, the Appellate Court, as has been indicated before, and I have the 535 Northeast Second Reporter, Second Series, the case beginning at 1065, and at 1068, the Appellate Court has indicated the sole issue on appeal is whether the National Labor Relations Act deprived the State Court of jurisdiction to enjoin the union from picketing with placards containing knowingly false statements or statements made in reckless disregard to the truth.

And then the Court, in that case, cites the elements which a Trial Court should consider in deciding whether to issue a preliminary injunction; and also on Page 1068, it cites three standards: 1, the possibility of irreparable harm to the plaintiff's legal rights pending the outcome of the trial if the preliminary injunction does not issue; 2, the potential irreparable harm to the defendants' right if it does; and, third, the plaintiff's likelihood of success on the merits; and for those propositions, it cites a 1987 Supreme Court of Illinois case, Kanter, K-a-n-t-e-r, versus Eisenberg, E-i-s-e-n-b-e-r-g, versus Mattson & Associates, at 116 Illinois 2d, 506.

But it goes on to indicate that the issue before the Court in Lowe in the Appellate Court was not whether the Court abuses its discretion in denying the request for the injunction, but whether its refusal to exercise jurisdiction or discretion was proper.

And then it goes in and discusses the question of preemption; and on Page 1069, it talks about the second type of federal preemption, which eventually it said, I think, didn't apply, and then which is, it said, "The second type of federal preemption requires preemption whenever the conduct complained of," and then in quotes, in open quotes, 'arguably subject,'" close quotes, "to the

jurisdiction of the National Labor Relations Board." It goes on to say, in open quotes, "'However, even if the claim involves state torts that are arguably subject to jurisdiction of the NLRB.'"

The Court in Garmon, which is G-a-r-m-o-n, noted an exception to preemption, "When the State's interests outweigh any peripheral federal concern or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional discretion, we could not infer that Congress can deprive the State of the power to act."

And that case, again, was involving a request for injunction and the complaint alleged tortious interference with contractual relationships, tortious interference with prospective economic advantage, trade libel and negligent interference with a contractor.

The sign in that case that was the subject of the suit was a red, in quotes, "Notice to the Public: Lowe Excavating does not pay the prevailing wages and economic benefits for operating engineers which are standard in this area. Our dispute concerns only substandard wages and benefits paid by this company, Local 150, International Union of Operating Engineers, AFL-CIO," close quotes.

The Appellate Court in Lowe also noted that the Illinois Supreme Court held that an action in State Court for defamation is not preempted by the jurisdiction of the NLRB, and they cite at Krasinski, K-r-a-s-i-n-s-k-i, versus United Parcel Service, a 1988 case, 124 Illinois 2d at 483.

The Appellate Court found that, as far as the preemption went, that case, the Lowe case, fell into the exemption cited by Garmon.

And then, as alluded to by Mr. Smetana, the Appellate Court, on Page 1071 of the Lowe decision, stated, as follows:

"The underlying issue in this case is not whether plaintiff paid wages sufficient to meet area standards, the issue is whether defendant, with actual malice, published a statement with knowledge of its falsity or in reckless disregard for the truth. While the truth

or falsity is an important element in the tort of trade libel, it is certainly not the only issue it be considered. The issues of injury to reputation and defendants' mental state must be considered."

The Appellate Court also went on to indicate -- and I think it's important with regard to this case -- that the defendant next contents [sic] that the State of Illinois had enforced [sic] the Anti-Injunction Act that is applicable. The Appellate Court noted that the Act may or may not apply. The issue was not before that Court, and the Trial Court could not reach the issue; therefore, the question of whether or not the Anti-Injunction Act applied in the Lowe case is not ripe for review.

In the Lowe case, finally what happened is the Appellate Court remanded to the Circuit Court of McHenry County this case to review the plaintiff's motion for a preliminary injunction consistent with the opinion.

That's why I say it's sort of Lowe Part 2, because that's where we are, at the stage of preliminary injunction, in determining whether or not one should be granted.

The Lowe case, a Second Appellate District case, sets forth the issues before the Court on a preliminary injunction, and another injunction case heard by this Court, the Second District, a 1988 case, Handy Andy Home Improvements versus American National Bank, which is found at 177 Illinois Appellate 3d, 674.

It just reiterates those standards, and I am just indicating that, as set forth in that Kanter versus Eisenberg case, the three standards, and those are basically the standards that I have applied.

Some of the other things I think are peripherally involved, but some of the ones that have a little more detail, are basically temporary restraining order cases; and here, since both sides have had an opportunity to be present, and even at this point defendant has not presented any evidence. They have had an opportunity to cross examine

I am going to take those standards in reverse order and deal with first the likelihood of plaintiff's success on the merits, and in looking at the trade libel count first.

I note that, basically, this Court has to determine and look at things that are of interest to the State, in protectable interest of the State, as indicated in the cases cited in Lowe and cases that we have talked about here.

Both counsel have at various times cited the Court to the Vee See Construction, that's V-e-e-S-e-e, Construction versus Jensen and somebody else. The case is found at 79 Illinois Appellate 3d, 1084, and at Pages 1089 to 90.

The Appellate Court in that case stated -- this is not an absolute quote, but close to it -- the stated cause of action or libel per se where the plaintiff is a corporation, the statement must be allegedly defaming the plaintiff in its trade or business, must assail the corporation's financial position or business methods or accuse it of fraud or mismanagement, and that case has been cited by both the plaintiff and the defendant to this point.

The Court has to review the matters before the Court.

The Court was going to say, somewhat prefatory before that, you know, the matter before it and the issues before it the Court finds to be, in general, a troubling area, personally; but I'm not here personally, I'm here to try to apply the law as I can, and if we were in a perfect world, we possibly wouldn't have such conflict; but we are not, and the Court has to deal with issues as they are in the law and life as it is and do the best that it can to apply the law to the facts.

The sign that is in question in this case, the placard, which is, I think, the only written statement we really have here, and I am referring to Plaintiff's Exhibit No. 1, a photograph of a sign that reads, "IUOE Local 150," in bold letters, "On Strike," and in smaller letters, against, and then in a printed form, the word, "Geske," G-e-s-k-e, and then back to printed, "for recognition," and the next

word is, "as majority bargaining representative of company's operating engineer employees." The sign is white, with red printing, except for the word "Geske," which is -- when I say "printing," I mean printed as opposed to handwritten. The word "Geske" is handwritten, and it's like a black or blue ink.

The Court must look to the sign, and to determine whether or not it falls within the area of the trade libel standard; and the Court has heard and considered the explanation as to how that standard applies, made by Mr. Smetana; but the Court believes that the sign, as indicated, does not fall within that definition of trade libel as set forth in the VeeSee case; that it does not -- and I don't think any reasonable extension of what it says could be thought to assail the corporation's financial position or business methods or accuse it of fraud or mismanagement.

And I would say peripherally -- and I think that maybe I shouldn't say anything because the case is pending before me -- but I don't think that the sign in Geske does by any reasonable interpretation indicate a trade libel against Geske, and I believe that the likelihood of success on the merits as to that count is small.

The issue was to tortious interference with contractual relationships and tortious interference with prospective advantage. I did note that, you know, Counsel for plaintiff, in talking about this, talked about interference with contractual relationships, but it has to be a tortious or a wrongful interference with contractual relationships.

Also, in commenting on some of the matters, first of all, there is no evidence in the record, as has been pointed out, with regard to -- at least there is nothing that I recall -- as to violence, and I think that's been conceded.

The only question of threats, I think one has to -- again, the admonition of the Court is to weigh the evidence and to the credibility and the quality of the evidence; and on the issue of quality, in weighing it, rather than on the issue of credibility, I think

one has to take a look at the evidence in the context of the group of people that we are dealing with.

We are not dealing with cloistered nuns, we are not dealing with second grade children, we are dealing with people in a labor situation, truck drivers, people who are more sophisticated or hardened in the ways of the world.

I'm not certainly saying that truck drivers or operating engineers or anyone else have to be subject to all kinds of treatment without retribution; but I think, you know, giving one the finger or being flipped off, these things, while certainly are rude, and crude possibly, in terms of everyday life, I don t believe can be thought to be, to one of normal sensibility, threatening, at least the -- some of the other gestures are. There is no evidence of anyone being that concerned about physical violence.

I think Mr. Larry Michael Geske indicated, and I think probably summed it up, that he was threatened, he felt threatened for the company, and that is in an economic sense.

But, you know, I think, fortunately, to a great extent, that's what these types of situations have somewhat to do with, economic situations, that is, economic struggles and strife.

The Court believes that there is evidence the activities -- I would say, before I get into that -- someone cited -- and I did read the case of Fellhauer, it's F-e-l-l-h-a-u-e-r, versus City of Geneva, 14 Illinois 2d, 495. It's a Supreme Court case arising out of the Trial Court decision in Kane County, in the Appellate Court of the Second District, involving an employee, apparently of the City of Geneva, and there were a couple of counts I noticed. There was a retaliatory discharge count and there was a tortious interference count. It may have some other things.

The Appellate Court reversed the -- strike that.

The Supreme Court reversed the Appellate Court and affirmed the Trial Court; but in the course of that opinion, it indicated -- and,

again, what I am doing is not an absolute quote, but it's fairly close, paraphrasing it

The Court, the Supreme Court stated it is generally recognized by Illinois courts that to prevail on a claim for tortious interference with prospective economic advantage, the plaintiff must prove, 1, a reasonable expectation of entering into valid business relationships; 2, knowledge by the defendant of the plaintiff's expectancy; 3, purposeful interference by defendant that prevented plaintiff's legitimate expectation to ripen; and, fourth, damages.

I think it is -- although it didn't talk about tortious interference with economic advantage -- it could be reasonably said that the elements there would probably be three or four, that there was a business relationship, that the plaintiff knew of it, that the interference prevented the continuation of that, or something to that effect, and that damages flow from it. That would be my -- it didn't talk about that, but generally that's what it would be.

I think the issue here before the Court, from the evidence it has before it on the issue of likelihood of success on both of these tortious interference counts, is whether or not there was a tortious interference.

The Court believes that the evidence does establish that there was a certain level of interference with the conduct of the plaintiff's business, based upon the evidence.

I think, by the very nature of having the picketers, et cetera, does have an interfering -- you know, that's intended. I mean, that is a part of it.

The question is whether or not, at least in the Court's mind, looking from the labor situation, as whether or not the interference was a lawful interference, whether or not there was anything wrongful or unlawful about the interference, based on the evidence.

And, again, the Court believes it is not looking into whether or not there was some kind of a labor violation, but whether or not

there was a violation of some kind of some right that the State courts are here to protect.

There was discussion of this ambulatory picketing, is what it was called, and to whether or not it must, you know, stop at the gates of the third parties or can continue down in.

There was some evidence, at least reference to the fact that at least some of the employers did have some kind of an agreement that the union could come on or on the property for -- I think the testimony was "lawful purposes or picketing."

There is no evidence, other than a couple minor intrusions on the Geske property, which I don't believe had anything to do with picket signs, although there may have been one stuck in the ground and kicked over.

There is no evidence that the defendants committed any unlawful trespasses. There is some evidence, like with regard to, I think, the Lee pit, or something, that they went on, but I don't believe the record indicates that it was necessarily a trespass. I don't know whether it was or wasn't

As to the following in the cars, again, without getting into the fine points of labor, there does not appear to have been any significant wrong committed.

As to the stopping of traffic on this unnamed but road leading down to Geske -- maybe somebody did give it a name, I don't know -- but the road that goes to the conservation district, it goes to the Geske plant, goes to the Melahn property, and whatever else is on there, the evidence as to any illegal interference I don't think is particularly strong.

Again, there was no evidence of threats of violence; there was some conversation, but the Court further does not believe that the plaintiff has established that it has likelihood of success on the merits on either of these tortious interference matters.

And the Court would also -- because I know counsel always have an eye from going somewhere else -- would comment that, in something that the Lowe Court referred to, is the question of the applicability of the Anti-Injunction Act.

The Court has reviewed the terms of the Anti-Injunction Act, and considering the statute, considering the evidence that has been presented before the Court at this time, the Court does not believe that the plaintiff has persuaded the Court that, under the facts and circumstances of this case, that the Anti-Injunction Act is inapplicable; therefore, I find it to be applicable under the facts and the circumstances of this case, and that is a further reason why I am denying the preliminary injunction.

MR. PIERSON: Thank you, your Honor?

MR. SMETANA: Thank you.

THE COURT: Now, you had asked me to defer until I terminated this proceeding on your request to file a third amended complaint. I will take that up at this point, if you wish it.

MR. LE SUEUR: We would renew that motion for leave to file, your Honor.

THE COURT: That motion is renewed. Any comment at this time from the defendants?

MR. PIERSON: I guess the only comment would be, your Honor, that we would oppose it on the ground that we would believe that it would not -- or that it might call into question the decision you just made, and that it would be a tragedy if we had to just then go through the entire thing again, because of a change in parties or some additional facts that they have alleged, you know, that somehow changed circumstances.

THE COURT: Response?

MR. SMETANA: Briefly, in response, I believe we had stated that it was not our intent to seek preliminary injunctive relief at this time with respect to those other matters, and certainly the Court's decision here on the preliminary injunctive relief would certainly substantially chill any likelihood of proceeding in that fashion certainly at this time.

But I think we would nevertheless like to proceed for permanent injunctive relief on damages, and possibly find other authorities to convince the Court to reconsider its decision based on the VeeSee case and so forth, what the standards are with respect to trade libel in the State.

THE COURT: I believe the plaintiff has the right, whether it be in this proceeding or another proceeding, to bring additional claims.

To the extent that the Court has ruled on the preliminary injunction at this time, I certainly have no intention of revisiting that matter.

But there are additional people, there are additional counts, there are additional allegations at different times, and I would therefore at this time give the plaintiff leave to file the third verified complaint, amended, or whatever it is, with summons to issue against additional parties defendant.

MR. LE SUEUR: Thank you, Judge.

MR. SMETANA: Thank you.

MR. PIERSON: Your Honor, if I may raise a question about how to style the order.

Is it adequate to simply refer to "For the reasons stated in open court, defendant's motion for directed finding is granted and preliminary motion denied"?

MR. SMETANA: We could have a certified copy of the Court Reporter statement, your Honor, if that's as set forth in the opinion of the Court.

THE COURT: That's fine with me.

MR. PIERSON: Do you want a written order, though?

THE COURT: There should be a written order just stating it was denied, and then you want to refer to the transcript or whatever, however you want to do it; but there should be a written order.

MR. PIERSON: Very good. Thank you, your Honor.

MR. SMETANA: I want to thank the Court very much for its time and patience. It was most generous, as I said before.

MR. LE SUEUR: Thank you, Judge.

MR. PIERSON: Thank you, your Honor.

MS. FARR: Thank you, your Honor.

(WHICH were all the proceedings had in the above-entitled matter, at the time and place aforesaid.)

STATE OF ILLINOIS)
COUNTY OF MCHENRY)

IN THE CIRCUIT COURT FOR THE
19TH JUDICIAL CIRCUIT
MC HENRY COUNTY, ILLINOIS

GESKE & SONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 91-CH-273
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 301,	)	Judge Sullivan
	)	
Defendants.	)	

SUPPLEMENTAL ORDER

This matter coming to be heard before the Court on Defendant's Motions to Dismiss and to Quash Service and Vacate Temporary Restraining Order, the Court having perused the pleadings and heard the arguments of counsel for Plaintiff and Defendants, and being fully advised in the premises, the COURT HEREBY ORDERS that both said Motions are herewith denied.

ENTER:

FILED
McHENRY COUNTY, ILLINOIS
SEP 20, 1991
VERNON W. KAYS, JR.
CLERK OF THE CIRCUIT COURT

Date: Sept. 20, 1991

Michael J. Sullivan \s\, Judge

CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT

STATE OF ILLINOIS } GEN. NO. 91 CH 273
COUNTY OF MCHENRY } SS ☐ Jury ☒ Non-Jury

GESKE & SONS, INC., vs. INT'L UNION OP ENG. LOCAL 150 ETC

Leseuer

Date 12/7/93 Plaintiff's Attorney Smetana, Avakian Defendant's Attorney _____

ORDER

This matter coming to Pl. Motion to Admit Michael E. Avakian Pro Hac Vice pursuant to Sup Ct Rule 707-and Plaintiffs's Oral Motion

A) For leave to file 4th Amended Complaint on or before Feb 7, 1994;
B) For leave to amend to supplement opposition to Def Motion to Dismiss on or before 2/7/94;
C) For leave to supplement opposition to Plaintiff's Motion for Malicious Prosecution on or before 2/7/94.

It is hereby ORDERED, THAT

1) Michael E. Avakian is admitted Pro Hac Vice.
2) Plaintiff Motion for leave to further amend complaint is granted to file on Feb 7, 1994 and Def is given 21 days to answer or otherwise plead.
3) Plaintiff's motion to further respond or supplement opposition to motion to dismiss is granted to Feb 7, 1994 and Def response is due 21 days and Pl. has 14 days to reply.
4) Motion to supplement opposition to Def. Motion for Malicious Prosecution is granted to Feb 7, 1994 and Def. response 21 days thereafter and 14 days to reply for Pl.
5) Next status is March 24, 1994 9:00 a.m.

FILED
McHENRY COUNTY, ILLINOIS
DEC 7, 1993
VERNON W. KAYS, JR.
CLERK OF THE CIRCUIT COURT

Prepared by: Gerard C. Smetana
Attorney for: Defendant Geske
Attorney Registration No. _____ Judge /s/ Michael J. Sullivan

CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT

STATE OF ILLINOIS } GEN. NO. 91 CH 273
COUNTY OF MCHENRY } SS ☐ Jury ☒ Non-Jury

GESKE & SONS, INC.,

vs.

IUOE LOCAL 150, and TEAMSTERS Local 301

Date Aug 2, 1994 Plaintiff's Attorney Michael Avakian Defendant's Attorney Baum & Sigman

ORDER

This matter coming to be heard upon transfer of the case from the Court Administrator, and the Court being duly apprised, it is hereby ORDERED, THAT

1) The Status hearing on August 10, 1994 is cancelled, and;

2) A hearing on all motions pending will be heard for argument on Thursday, August 11, 1994, at 1:30 p.m.

FILED
McHENRY COUNTY, ILLINOIS
Aug. 2, 1994
VERNON W. KAYS, JR.
CLERK OF THE CIRCUIT COURT

Prepared by: Michael Avakian
Attorney for: Plaintiff
Attorney Registration No. _____ Judge /s/ Haskell M. Pitluck
8/2/94

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GESKE & SONS, INC.,	)
	) DOCKET NO. 91 C 5659
Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION	)
OF OPERATING ENGINEERS,	)
et al.,	) CHICAGO, ILLINOIS
	) September 11, 1991
Defendants.	) 9:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARRY D. LEINENWEBER

APPEARANCES:

FOR THE PLAINTIFF: Mr. GERARD C. SMETANA
(Richman, Lawrence, Mann,
Greene & Smetana
333 West Wacker Drive
Chicago, Illinois 60606)

FOR THE DEFENDANTS: MR. DALE D. PIERSON
(Baum & Sigman, Ltd.
200 West Adams Street
Chicago, Illinois 60606)

MR. MARTIN BARR
(Carmell, Charone, Widmer
Mathews & Moss
225 West Washington Street
Chicago, Illinois 60606)

THE CLERK : 91 C 5659, Geske & Sons vs. International Union.

MR. PIERSON: Good morning, your Honor. Dale Pierson on behalf of Local 150 of the Operating Engineers.

MR. BARR: Good morning, your Honor. Martin Barr on behalf of the defendant, Local 301.

MR. SMETANA: Good morning, your Honor. Gerard Smetana for the plaintiff, Geske & Sons.

THE COURT: On the motion to remand.

Plaintiff filed a three count complaint in state court arising out of a labor dispute with the defendant unions. Plaintiff is non-union and apparently wants to remain so. The defendants are picketing plaintiff to coerce it into entering into a collective bargaining agreement. The complaint alleges that defendants are untruthfully informing the public and plaintiff's customers that its employees are on strike, that it is out of business, and that its competitors are cheaper. It also alleges that the defendants are threatening its employees and customers with bodily harm and property damage. As a result some of plaintiff's customers have stopped doing business with plaintiff.

The complaint as originally drafted also make allegations in Paragraph 18 that defendants are carrying out a secondary boycott. The prayer of each count of the complaint, however, remains true to the count's characterization. The three counts are characterized a trade libel, tortious interference, contractual relations and tortious interference with prospective advantage, all of which are cause of actions available under Illinois common law.

The defendants removed the case to this court on the basis of federal question jurisdiction. The plaintiff has filed a motion to remand for lack of jurisdiction.

The Supreme Court in *Caterpillar, Inc. vs. Williams*, 107 S.Ct 2425 (1987), set forth the principles governing removal jurisdiction.

> "The presence or absence of federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. (Citation omitted). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."

Here the plaintiff has pleaded three state common law claims and has avoided praying for any relief based on any federal statute.

The defendants, however, contend that plaintiff in Paragraph 18 has in fact pleaded a claim of secondary boycott which is prohibited by Section 303 of the LMRA. Assuming the paragraph contains sufficient allegations to state such a claim, it is clearly unnecessary for the plaintiff's common law claims and can be disregarded under Illinois law as surplusage. 30 ILP, "Pleading", Section 13. In any event, what defendants are raising is a defense to plaintiff's three claims, that is, that because of the peculiar facts of this case plaintiff's claims are preempted by the LMRA. However, *Caterpillar* answers this objection:

> "Ordinarily federal preemption is raised as a defense to the allegations in a plaintiff's complaint. Before 1887 a federal defense such as preemption could provide a basis for removal, but in that year Congress amended the removal statute. We interpret that amendment to authorize removal only where original federal jurisdiction exists. Thus, it is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption."

Thus, defendants may be correct that plaintiff will prove a claim that is preempted by federal law. The defendants may also be correct that plaintiff may not even state a claim under state law. If so, the state court can dismiss the complaint either because of preemption or for failure to state a claim. In fact, the two Supreme Court cases relied on by defendants, *Sears, Roebuck and Company vs. San Diego*, 98 S.Ct. 1745 (1978) and *Amalgamated vs. Lockridge*, 91

S.Ct. 1909 (1971) were both appeals of state court rulings on preemption.

There are two exceptions to the well-pleaded complaint rule, the "complete preemption" doctrine (*Caterpillar*, at Page 2430) and its corollary, the "artful pleading" doctrine. (*See Lingle vs. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987) reversed on other grounds, 108 S.Ct. 1877 (1988). These two doctrines have been applied primarily to Section 301 claims to enforce collective bargaining agreements and claims under ERISA. (*See Caterpillar*, at Page 2430 and *Metropolitan Life Insurance Co.*, 107 S.Ct. 1542 (1987), neither of which is implicated here. No one contends, as with ERISA, that Section 303 sought to preempt the entire labor-related tort field. (*See Metropolitan*, at Page 1547 and *Lowe Excavating vs. Local No. 150*, 129 Ill. Dec. 300, 2nd Dist. 1989).

In conclusion, because plaintiff's complaint does not on it face contain a federal claim, It is not subject to removal here.

Accordingly, plaintiff's motion is granted and the cause is remanded to state court.

MR. SMETANA: Could we get a copy of that order, Your Honor?

THE COURT: Pardon?

MR. SMETANA: Could we get a copy of that order to take to state court?

THE COURT: You will have to order it from the court reporter.

MR. SMETANA: Could we get a Xerox of your copy, perhaps?

THE COURT: No. You will have to talk to Mr. Cheek.

MR. SMETANA: We will talk to the reporter. Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause.) I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ James W. Cheek — 10-23-91
Official Court Reporter — Date

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number 91 C 5659 — Date SEP 11, 1991

DOCKET ENTRY Plaintiff's motion for remand is granted. Cause remanded to State Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3272

GLENN A. ZIPP, Regional Director of the Thirty-Third Region of the National Labor Relations Board and NATIONAL LABOR RELATIONS BOARD,

Plaintiffs-Cross-Defendants-Appellees,

v.

GESKE & SONS, INCORPORATED,

Defendant-Cross-Plaintiff-Appellant,

v.

WILLIAM B. GOULD, IV, individually, and as Chairman of the National Labor Relations Board, JAMES M. STEPHENS, individually, and as a member of the National Labor Relations Board, DENNIS M. DEVANEY, individually, and as a member of the National Labor Relations Board, *et al.*,

Cross-Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 94 C 50231.—Philip G. Reinhard, *Judge.*

ARGUED APRIL 15, 1996—DECIDED JANUARY 9, 1997

Before COFFEY, RIPPLE and DIANE P. WOOD, *Circuit Judges.*

RIPPLE, *Circuit Judge.* This case is a companion case to *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1997 U.S. App. LEXIS 394, Nos. 95-2213 & 95-2358 (7th Cir. Jan. 9, 1997) ("Geske I"). In this

case, Geske & Sons, Inc. ("Geske") sought an injunction from the district court prohibiting the National Labor Relations Board ("NLRB" or "the Board") from pursuing unfair labor practice charges against Geske. The district court held that, under the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA" or "the Act"), it lacked subject matter jurisdiction to consider Geske's claims, and therefore dismissed them. Geske now appeals, and we affirm.

I

BACKGROUND

We shall assume the reader's familiarity with the facts and holding in Geske I, and repeat them here briefly only insofar as they are relevant to this appeal.

Geske is the only non-unionized asphalt manufacturer in the Chicago area. The International Union of Operating Engineers, Local 150 ("Local 150" or "the Union"), represents operating engineers in the construction industry in the Chicago area. In August 1991, Local 150 began to picket Geske's plant for recognition as the union representing Geske's operator workers. The Union's picket included signs that stated:

I.U.O.E. LOCAL 150
ON STRIKE
AGAINST
GESKE
FOR RECOGNITION AS MAJORITY BARGAINING
REPRESENTATIVE
OF COMPANY'S OPERATING ENGINEER EMPLOYEES

On September 5, 1991, Geske filed suit in Illinois state court contending that Local 150's picket signs libeled Geske. Geske claimed that the "On Strike" statement on the signs falsely implied that Geske's workers were on strike and refused to work. According to Geske, such a false representation constitutes a cause of action in Illinois for trade libel.

Geske sought from the Illinois trial court a preliminary injunction prohibiting Local 150 from further picketing with the allegedly defamatory signs. The trial court denied the injunction, and Geske took an interlocutory appeal. Geske moved for and received a stay of proceedings in the trial court until its interlocutory appeal was resolved.

Meanwhile, on September 19, Local 150 responded to Geske's state suit by filing an unfair labor practice charge with the NLRB. The charge claimed that, because Geske's state suit was baseless and filed with a retaliatory intent, Geske's prosecution of the suit constituted an unfair labor practice under section 8(a) of the Act, 29 U.S.C. § 158(a).[76] Local 150 filed a First Amended Charge on March 24, 1992, and the NLRB's General Counsel filed a complaint against Geske on March 30, 1992.

On April 1, 1992, Glenn Zipp, the Regional Director of the NLRB, sent letters to the Illinois trial and appellate courts in which Geske's suit and interlocutory appeal were pending. The letters explained that the state suit was the subject of an unfair labor practice complaint pending before the NLRB, and that Geske therefore could not pursue its case in state court until the NLRB resolved the federal labor law charges.

The Illinois appellate court then solicited position statements from the parties regarding the appropriateness of staying Geske's appeal. On May 19, 1992, the Illinois appellate court stayed its proceedings pending resolution of the charges before the NLRB. Geske moved for reconsideration, but the court denied Geske's motion. On September 14, however, the court lifted the stay.[77] On September 29, 1992, the Illinois appellate court affirmed the trial

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[76]Section 8(a)(1), 29 U.S.C. § 158(a)(1), insofar as it is relevant to this case, provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights [to self-organize or to join labor organizations]."

[77]Although the record is not clear why the Illinois appellate court lifted the stay, it appears that the court believed that the NLRB case soon would be resolved.

court's denial of Geske's motion for a preliminary injunction.[78] Geske then petitioned for rehearing before the Illinois appellate court, leave to appeal to the Illinois Supreme Court, and a writ of certiorari from the United States Supreme Court. Each court denied Geske's petition.[79]

In the meantime, the NLRB held a hearing before an administrative law judge ("ALJ") on Local 150's unfair labor practice charge against Geske. On February 24, 1994, the ALJ issued her decision against Geske. She found that, under applicable Illinois law, Geske's suit against Local 150 was baseless. She found further that Geske filed its suit with a retaliatory motive. Accordingly, she recommended that the Board order Geske to cease and desist from prosecuting its state lawsuit.

Despite this adverse ruling, Geske continued to pursue its lawsuit against Local 150 in the Illinois courts. In July 1994, the Regional Director of the NLRB therefore petitioned the federal district court, pursuant to 29 U.S.C. § 160(j), to enjoin Geske from prosecuting its state lawsuit until the Board issued its final decision in the unfair labor practice proceedings.

In August 1994, Geske answered the Board's complaint and filed three counterclaims. The first counterclaim alleged that the Board interfered with Geske's First Amendment right to petition the state courts for redress of grievances. The second counterclaim alleged that the Board violated section 3(d) of the Act, 29 U.S.C. § 153(d), by unlawfully delegating to the General Counsel the authority to preempt state litigation based upon the General Counsel's issuance of an unfair labor practice complaint. According to Geske, the Board may preempt state court litigation only by issuing

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[78]*Geske & Sons v. International Union Local 150*, 211 Ill. Dec. 428, 655 N.E.2d 331 (Ill. App. Ct. 1992) (unpublished order).

[79]*Geske & Sons, Inc. v. International Union of Operating Eng'rs, Local 150*, 151 Ill. 2d 563, 616 N.E.2d 333, 186 Ill. Dec. 380 (Ill. 1993); *Geske & Sons, Inc. v. International Union of Operating Eng'rs, Local 150*, 510 U.S. 992, 126 L. Ed. 2d 452, 114 S. Ct. 551 (1993).

an order pursuant to section 10(c) of the Act, 29 U.S.C. § 160(c). Finally, Geske's third counterclaim alleged that the charges contained in the March 24 "First Amended Charge" were filed by the Regional Office of the NLRB rather than by Local 150. Geske submits that this action by the Board violates section 10(b) of the Act, 29 U.S.C. § 160(b).

Through its counterclaims, Geske sought declaratory and injunctive relief. In particular, Geske sought "a Declaratory Judgment that the Board is without jurisdiction to restrain a fairly pled state court lawsuit." Geske also sought an injunction ordering the Board "to vacate and set aside its wrongful administrative action purporting to deny [Geske] the right to file and litigate a lawsuit to redress libel [in Illinois state courts]."

On April 26, 1995, the Board issued its decision, in which it affirmed the ALJ's holdings and order. In light of this decision, on May 8 the Board voluntarily dismissed its petition for an injunction in the district court. Thus, the only issues that remained before the district court were Geske's counterclaims.

On July 21, 1995, the district court dismissed Geske's counterclaims for lack of subject matter jurisdiction. The district court held that it had no jurisdiction to enjoin an NLRB unfair labor practice proceeding and that Geske's proper avenue for judicial review was to petition this court for review of the Board's final decision. In that way, the district court held, "all of [Geske's] counterclaims may be presented to, and decided by, the court of appeals." This appeal from the district court's dismissal of Geske's counterclaims followed.

II

DISCUSSION

It is well settled that a district court has no jurisdiction to enjoin unfair labor practice hearings before the NLRB. 29 U.S.C. § 160(e), (f); *see Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 82 L. Ed. 638, 58 S. Ct. 459 (1938); *Vapor Blast Mfg. Co. v.*

Madden, 280 F.2d 205, 208-09 (7th Cir.), cert. denied, 364 U.S. 910, 5 L. Ed. 2d 225, 81 S. Ct. 273 (1960).[80] Generally, a party seeking to challenge NLRB proceedings must first exhaust its administrative remedies, and then may petition for review only before the court of appeals. Nevertheless, Geske submits that its first counterclaim falls into an exception to these usual requirements. According to Geske, the Board's attempt to enjoin its state lawsuit violates its First Amendment right to petition the state courts for redress of grievances and exceeds the Board's statutory authority. In such a situation, Geske contends, a federal district court has jurisdiction to hear its constitutional and statutory challenges to the Board's allegedly improper actions.

It is true that there exists a narrow "statutory authority" exception to the usual jurisdictional requirement of exhaustion of administrative remedies. *See Leedom v. Kyne*, 358 U.S. 184, 188, 3 L. Ed. 2d 210, 79 S. Ct. 180 (1958); *Abercrombie v. Office of the Comptroller of the Currency*, 833 F.2d 672, 675 (7th Cir. 1987). This exception allows a district court to enjoin agency action in cases in which the agency has exceeded a "plain and unambiguous statutory command or prohibition . . . in circumstances where no adequate alternative judicial remedy exists." *Abercrombie*, 833 F.2d at 675. Similarly, a district court may enjoin agency action that amounts to a "plain violation" of a constitutional right. *Squillacote*

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[80]Geske erroneously submits that *McCarthy v. Madigan*, 503 U.S. 140, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992), requires a district court to engage in a balancing test of the parties' interests to determine whether exhaustion of administrative remedies is required. Congress has expressly limited the federal jurisdiction to review only final orders of the NLRB; moreover, that jurisdiction is vested solely in the courts of appeals. 29 U.S.C. § 160(e), (f); *see Myers*, 303 U.S. at 48. As *McCarthy* acknowledged, "of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required." 503 U.S. at 144 (citing *Patsy v. Board of Regents*, 457 U.S. 496, 502 & n.4, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982) (noting that *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 82 L. Ed. 638, 58 S. Ct. 459 (1938), is a case holding that Congress has mandated exhaustion of administrative remedies in NLRB proceedings)). Accordingly, there is no merit to Geske's contention that the district court should have engaged in a balancing test before holding that exhaustion of NLRB remedies was required.

v. International Bhd. of Teamsters, Local 344, 561 F.2d 31, 39 (7th Cir. 1977).[81] A plain violation is one in which a provision of a statute is unconstitutional on its face. *Grutka v. Barbour*, 549 F.2d 5, 8 (7th Cir.), *cert. denied*, 431 U.S. 908, 52 L. Ed. 2d 394, 97 S. Ct. 1706 (1977).

The Board's actions in this case were neither violative of a "plain and unambiguous statutory command or prohibition" nor plainly unconstitutional. Section 10(a) of the Act, 29 U.S.C. § 160(a), grants authority to the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983), the Supreme Court held that "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit" filed for retaliatory reasons. Thus, the Board clearly has the statutory authority to enjoin a baseless state lawsuit as an unfair labor practice. Moreover, it is not plainly unconstitutional to enjoin the prosecution of a baseless lawsuit. In *Bill Johnson's*, the Supreme Court further held that, if a lawsuit is baseless, it enjoys no First Amendment protection, and the Board may enjoin its prosecution without offending the Constitution. *Id.* at 743. Thus, neither section 10(a) of the Act, 29 U.S.C. § 160(a), nor the Board's application of that section to enjoin baseless lawsuits is unconstitutional on its

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[81]Geske incorrectly submits that *Squillacote* "accepted the constitutional basis for [a] challenge to agency action where the constitutional claim is not transparently frivolous." Appellant's Br. at 20. This is an erroneous reading of that case. In fact, Squillacote discussed and rejected the proposition that any constitutional claim that was not "transparently frivolous" conferred jurisdiction on the district court. 561 F.2d at 37- 39. Instead, *Squillacote* "concluded . . . that the narrow exception [to the exhaustion requirement] created in *Leedom v. Kyne* applies only to a plain violation of [a] right, even when the right is based on the Constitution rather than [on a] statute." *Id.* at 39.

face.[82] Accordingly, the district court correctly held that it lacked jurisdiction to hear Geske's first counterclaim.

Finally, the district court properly determined that it lacked jurisdiction to entertain Geske's second and third counterclaims. Neither counterclaim alleged a plain constitutional violation, nor did either counterclaim allege that the NLRB violated a "plain and unambiguous statutory command or prohibition." Rather, both counterclaims require for their resolution the interpretation of various provisions of the Act. Under these circumstances, Geske's only route to challenge the Board's allegedly unlawful actions was to exhaust its administrative procedures before the Board and then to petition this court for review of the Board's final order, rather than to petition the district court to enjoin the Board's unfair labor practice hearings. See 29 U.S.C. § 160(e), (f).

Conclusion

For the foregoing reasons, the district court correctly concluded that it lacked subject matter jurisdiction to entertain Geske's counterclaims. Accordingly, the order of the district court dismissing Geske's counterclaims is affirmed.

AFFIRMED

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[82]Nor does the district court have jurisdiction to hear Geske's claim that the Board violated its First Amendment rights based on Geske's assertion that its state lawsuit is not baseless. Even if the Board incorrectly determined that Geske's lawsuit is baseless, that error would not amount to a "plain violation" of the Constitution so as to confer jurisdiction on the district court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 481, 11 L. Ed. 2d 849, 84 S. Ct. 894 (1964) ("The Kyne exception is a narrow one, not to be extended to permit plenary district court review of Board orders . . . whenever . . . an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeal . . . ."); *Grutka*, 549 F.2d at 8 (same).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGEMENT - WITH ORAL ARGUMENT

Date: January 9, 1997

BEFORE: Honorable John L. Coffey, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Diane P. Wood, Circuit Judge

No. 95-3272

GLENN A. ZIPP, Regional Director of the Thirty-Third Region of the National Labor Relations Board and NATIONAL LABOR RELATIONS BOARD,

Plaintiffs-Cross-Defendants-Appellees

v.

GESKE & SONS, INCORPORATED,

Defendant-Cross-Plaintiff-Appellant

v.

WILLIAM B. GOULD, IV, individually, and as Chairman of the National Labor Relations Board, JAMES M. STEPHENS, individually, and as a member of the National Labor Relations Board, DENNIS M. DEVANEY, individually, and as a member of the National Labor Relations Board, et al.,
Cross-Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Illinois, Western Division
No. 94 C 50231.—Philip G. Reinhard, Judge.

The judgement of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 94 C 50231 Date July 21, 1995

Case Title: Zipp, et al v. Geske & Sons, Inc.

DOCKET ENTRY

(10) (Other docket entry) For the reasons stated on the reverse, the court grants petitioner's motion and dismisses the three counterclaims filed by respondent, Geske & Sons, Inc. All pending motions are denied as moot. This case is dismissed in its entirety.

\s\
Judge Philip G. Reinhard

ORDER

Petitioner, Glenn A. Zipp (regional director for the National Labor Relations Board (NLRB)), filed suit in this court seeking to enjoin, pursuant to section 10(b) of the National Labor Relations Act (NLRA), respondent, Geske and Sons, Inc. (Geske), from filing a fourth amended complaint and proceeding any further in its state court action in McHenry County, Illinois. Geske, in turn, filed three counterclaims against Zipp alleging: (1) that it was being denied its First Amendment right to petition the government for redress of grievances by Zipp's alleging, in an action before the NLRB, that Geske's state court lawsuit constituted an unfair labor practice; (2) that the NLRB had violated its express statutory authority to make unfair labor practice rulings; and (3) that the Board's initiating an unfair labor practice charge through its general counsel exceeded its delegated powers and authority under the NLRA. Subsequently, the NLRB upheld the decision of the ALJ that Geske's state court

lawsuit constituted an unfair labor practice, and Zipp voluntarily dismissed his section 10(j) injunction action in this court. Geske declined to voluntarily dismiss its counterclaims which led to the present motion to dismiss those claims by Zipp.

Zipp contends that this court lacks subject matter jurisdiction over all three of Geske's counterclaims because the issues raised therein are within the exclusive purview of the NLRA and may be raised before, and decided by, the court of appeals. Geske responds that this court has jurisdiction to hear the counterclaims because Zipp and the NLRB have acted contrary to the express provisions of the NLRA and because Geske has been denied its constitutional right to seek redress in state court, an issue the NLRB cannot decide.

The long-standing general rule which Geske must circumvent to maintain its counterclaims here is that parties exhaust prescribed administrative remedies before seeking relief from the federal courts. *See McCarthy v. Madigan*, 112 S. Ct. 1081, 1086 (1992) (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Under the NLRA, the administrative procedure includes ultimate judicial review by the court of appeals. There are, however, limited exceptions to that procedural scheme which provide for access to the district court.

There is a "statutory exception" which is available where an agency has exceeded a plain and unambiguous statutory command or prohibition where no alternative judicial remedy exists. *Abercrombie v. Office of Comptroller of Currency*, 833 F.2d 672, 675 (7th Cir. 1987). This exception apples to actions before the NLRB. *Chicago Truck Drivers, Helpers and Warehouse Workers Union v. NLRB*, 599 F.2d 816, 818 (7th Cir. 1979). The exception in the labor context is narrowly construed. *Id.* Further, although never endorsed by the Supreme Court, the Seventh Circuit has also recognized a "constitutional exception" which allows an action in the district court notwithstanding section 10 of the NLRA where a party seeks to challenge the constitutionality of a provision of the NLRA. *Squillacote v. International Brotherhood of Teamsters*, 561 F.2d 31, 37 (7th Cir. 1977); *see also Grutka v. Barbour*, 549 F.2d 5, 8-10 (7th Cir. 1977) (acknowledging but not adopting such an exception).

Raising such a constitutional issue to the NLRB's procedures when judicial review is available in the courts of appeal, is, however, insufficient to confer jurisdiction on the district court. *Squillacote*, 561 F.2d at 38. Moreover, even where there is a constitutional challenge to the NLRA, there must be a plain violation of the constitution. *Adventist Living Ctr. v. NLRA (sic)*, No. 84 C 5280, 119 L.R.R.M. 2407 (Mar. 6, 1986); *Squillacote*, 561 F.2d at 39.

In the present case, Geske's counterclaims do not fall within any of the recognized exceptions to the exhaustion requirement. All of these counterclaims may be presented to, and decided by, the court of appeals. That satisfies the lynchpin concern of all of its claims. Furthermore, Geske has not shown a plain violation by the NLRB of either the NLRA or the Constitution in its determining that Geske's state court suit constitutes an unfair labor practice. Neither is the court persuaded by Geske's challenge to the authority of the general counsel to initiate the unfair labor practice charges. Therefore, the court dismisses Geske's counterclaims because it lacks jurisdiction to consider them.

(2)

Supreme Court, U.S.
FILED
JUL 1 1997
CLERK

No. 96-1740

In the Supreme Court of the United States

OCTOBER TERM, 1996

GESKE AND SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

17 pp

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by bringing a baseless lawsuit against the unions to retaliate against their lawful picketing.

2. Whether the National Labor Relations Board properly exercised its remedial power by ordering petitioner to reimburse the unions for the attorneys' fees incurred in defending against the retaliatory lawsuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1740

GESKE AND SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 103 F.3d 1366. The decision and order of the National Labor Relations Board (Pet. App. 24a-31a), and the decision of the administrative law judge (Pet. App. 32a-120a), are reported at 317 N.L.R.B. 28.

JURISDICTION

The court of appeals (Pet. App. 162a) entered its judgment on January 9, 1997. On March 20, 1997, Justice Stevens extended the time within which to

file a petition for a writ of certiorari to April 30, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in asphalt paving and the manufacture of asphalt mix. Pet. App. 35a. On August 19, 1991, Operating Engineers Local 150, assisted by Teamsters Local 301 (the Unions), began picketing petitioner's facility, seeking recognition as the representative of petitioner's employees. *Id.* at 2a, 42a, 43a. Six to twelve pickets patrolled along a public roadway running in front of the plant, carrying picket signs that read: "I.U.O.E. LOCAL 150 ON STRIKE AGAINST GESKE FOR RECOGNITION AS MAJORITY BARGAINING REPRESENTATIVE OF COMPANY'S OPERATING ENGINEERS." *Id.* at 42a-43a.

2. In September 1991, petitioner filed suit in state court against the Unions, alleging trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage. Pet. App. 3a, 63a-64a. The complaint requested injunctive relief and damages "incidental to [the] injunctive relief." *Id.* at 117a; see also *id.* at 4a. Following a nine-day hearing, during which petitioner introduced the testimony of approximately 17 witnesses, the state court granted the Unions' motion for a directed finding in their favor and denied petitioner's request for a preliminary injunction. *Id.* at 4a, 80a, 131a. The court explained that the Unions' picket signs did not "by any reasonable interpretation indicate a trade libel against Geske, and I believe that the likelihood of success on the merits as to that count is small." *Id.* at 138a. The court also found that

petitioner had no likelihood of success on its claims of tortious interference with contractual relationships and prospective advantage, because any interference in petitioner's business was a lawful "part of" the picketing and flowed from "the very nature of having the picketers." *Id.* at 140a-141a. Petitioner presented "no evidence" that the Unions "committed any unlawful trespasses" or made "threats of violence." *Id.* at 141a.[1]

The Appellate Court of Illinois affirmed the trial court's denial of injunctive relief. Pet. App. 93a, 121a-130a. The Illinois Supreme Court denied petitioner leave to file an appeal. *Id.* at 5a. This Court denied petitioner's petition for a writ of certiorari. *Id.* at 5a & n.4, 96a.

3. While petitioner's case was pending before the Appellate Court of Illinois, the Regional Director of the National Labor Relations Board (Board) issued an administrative complaint against petitioner. Pet. App. 87a-88a. The complaint alleged that petitioner had prosecuted a state-court lawsuit that lacked a reasonable basis and was motivated by an intent to retaliate against the Unions for engaging in protected concerted activity, in violation of Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1). Pet. App. 87a.

The administrative law judge (ALJ) sustained the Regional Director's complaint. Pet. App. 32a-120a. The ALJ found that Local 150 was engaged in peaceful recognitional picketing protected by the Act. *Id.* at 102a-107a, 116a. Applying *Bill Johnson's Restau-*

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[1] Petitioner subsequently filed a third and fourth amended complaint, in which it added various new defendants and allegations to the suit. Pet. App. 82a, 96a, 131a, 146a.

rants, Inc. v. *NLRB*, 461 U.S. 731 (1983), the ALJ concluded that petitioner violated Section 8(a)(1) by filing and prosecuting its state-court suit against the Unions. Pet. App. 116a. First, relying "mostly on the determination of the state judge who conducted the state court trial that [petitioner] had failed to establish likelihood of success on the merits, and on the action of the state appellate and supreme courts in denying [petitioner's] interlocutory appeal," the ALJ concluded that the lawsuit was without basis. *Id.* at 110a. Although petitioner asserted that it had "lots of other evidence" beyond what it presented to the state courts in support of its preliminary injunction motion, the ALJ observed that petitioner had "fail[ed] to enlighten me as to the nature of this 'lots of other evidence.'" *Id.* at 34a n.4.[2]

Second, the ALJ found, based on the evidence presented to her, that petitioner had filed and prosecuted the state-court lawsuit "to retaliate against the protected concerted activity of [the Unions]." Pet. App. 115a.

Based on the violation of Section 8(a)(1), the ALJ recommended that the Board order petitioner, among other things, to withdraw its state-court lawsuit "to the extent that this lawsuit includes allegations in the third amended complaint or its predecessors" and to reimburse the Unions for all legal expenses "incurred in connection with such allegations." Pet. App. 118a.

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[2] The ALJ further found petitioner's argument that the ruling on the preliminary injunction motion did not substantially dispose of its case to be inconsistent with representations petitioner previously made to this Court and to the Illinois Supreme Court. Pet. App. 111a.

With certain modifications not relevant here, the Board affirmed the ALJ's findings and conclusions and adopted the recommended order. Pet. App. 24a-31a.[3]

4. The court of appeals enforced the Board's order. Pet. App. 1a-23a. The court agreed with the Board that, "under the Illinois standard for trade libel, [petitioner's] state lawsuit against Local 150 and the other defendants was clearly baseless." *Id.* at 23a.[4] The court rejected petitioner's contention that inclusion of the phrase "On Strike" rendered the picket signs false, agreeing with the state courts that "there is no reasonable way to interpret the statements as [petitioner] suggests." *Id.* at 13a. Furthermore, even if the picket signs contained a false statement, the court of appeals agreed with the state courts and the Board that, under Illinois law, petitioner was not defamed: "There is nothing about a company's employees being on strike that suggests that the

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[3] Despite the ALJ's decision, petitioner continued to prosecute its state-court suit. The Board's Regional Director filed a petition in federal district court, seeking an injunction barring petitioner from prosecuting its lawsuit until the Board issued a final decision in the unfair labor practice proceeding. Pet. App. 157a; see 29 U.S.C. 160(j). Petitioner filed a number of counterclaims. Pet. App. 157a-158a. When the Board issued its decision affirming the ALJ, the Regional Director voluntarily dismissed his petition. The district court then dismissed petitioner's counterclaims for lack of jurisdiction. *Id.* at 158a, 163a-165a. The court of appeals affirmed. *Zipp* v. *Geske & Sons, Inc.*, 103 F.3d 1379 (7th Cir. 1997) (Pet. App. 154a-162a). Petitioner has not sought further review of that decision.

[4] The court noted that only the viability of the state libel claim was at issue in the case, because petitioner had not included its tortious interference claims in its statement of issues presented for appellate review. Pet. App. 11a.

company has engaged in fraud or mismanagement or that necessarily assails the company's financial position or business methods." *Id.* at 14a (citing *Vee See Constr. Co.* v. *Jensen & Halstead, Ltd.*, 399 N.E.2d 278 (Ill. App. Ct. 1979)). The court also ruled that substantial evidence supported the Board's finding that petitioner filed the lawsuit for retaliatory reasons. Pet. App. 15a, 23a. Petitioner's claim to the contrary was deemed "completely devoid of merit." *Id.* at 15a.

Lastly, the court of appeals held that the Board acted within its broad remedial authority in ordering petitioner to reimburse the Unions for the attorneys' fees they incurred in defending against petitioner's lawsuit. Pet. App 20a-23a. The court noted that "the Board may award attorneys' fees to unions when they are subjected to patently frivolous litigation before the Board in the course of an unfair labor practice proceeding," and that "[t]hat situation is highly analogous to the situation before us today." *Id.* at 22a. The award of fees, moreover, "effectuates the policies underlying the [Act]," because "[t]he injured party, the [u]nion that plays a necessary part in the organizational activities of the employees, is compensated for expenses that it would not have incurred in the absence of the baseless state law suit." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 11-19) that the court of appeals erred in applying the standard established in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), for determining when an employer's state court action violates Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1). In *Bill Johnson's*, this Court held that "it

is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against" an exercise of rights protected by the Act. 461 U.S. at 744. A lawsuit is baseless if the employer cannot "present the Board with evidence that shows his lawsuit raises genuine issues of material fact" or "genuine state-law legal questions." *Id.* at 745-746. If a lawsuit is determined to be baseless, the Board may then decide whether the suit was filed with the subjective intention of retaliating against the exercise of protected rights. *Id.* at 747.

a. Petitioner does not challenge the Board's finding that the Unions in this case were engaged in peaceful recognitional picketing protected by the Act. Nor does petitioner seek review of the Board's factual finding that petitioner filed and prosecuted its state-court lawsuit in order to retaliate against the Unions for engaging in such protected activity. Rather, petitioner contends (Pet. 11) that the court of appeals erred in holding that its lawsuit was baseless because the suit was not "based on intentional falsehoods or on knowingly false claims." This claim does not merit further review.

This Court recognized in *Bill Johnson's* that, in addition to suits based on "intentional falsehoods" and "knowingly frivolous claims," (461 U.S. at 743) lawsuits that "lack[] a reasonable basis in fact or law" can provide the predicate for a Section 8(a)(1) violation. *Id.* at 748. The court of appeals correctly found that petitioner's trade libel claim lacked such a reasonable basis. Both the state trial and appellate courts held that petitioner was unlikely to succeed on its trade libel claim. Pet. App. 125a-127a, 138a. Nor did petitioner's trade libel claim present a genuine issue of material fact, because the content of the

picket signs was not in dispute. Furthermore, each state court that reviewed the claim concluded that there was no reasonable way to construe the signs as constituting a trade libel. *Id.* at 127a, 138a. Accordingly, the court of appeals correctly concluded that petitioner's trade libel claim was baseless under the standard set forth in *Bill Johnson's*.

b. Contrary to petitioner's assertion (Pet. 12), the court of appeals' decision is consistent with *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993). *Columbia* held that, under the antitrust laws, litigation is a "sham" if the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." 508 U.S. at 60. In the present case, every court that has considered the question—both state and federal—has concluded (as did the NLRB) that petitioner's trade libel claim had no realistic chance of success on the merits. Those consistent determinations are the equivalent of a finding that the case is "objectively baseless." This is especially true in light of petitioner's inability or unwillingness to identify any new or additional evidence to buttress its claim, beyond what it presented to the state courts at the preliminary injunction stage five years ago.

Likewise, petitioner's contention (Pet. 12-13) that the court of appeals' decision conflicts with decisions of the Third, Fifth, and Ninth Circuits is without merit. Petitioner notes that those courts applied a "no realistic chance of success on the merits" standard. *Ibid.* That is merely another way of articulating the standard applied by the Board and the court of appeals here. See Pet. App. 12a-14a, 109a-113a (applying *Bill Johnson's* standard and relying, *inter alia*,

upon state courts' finding that petitioner is unlikely to succeed on the merits).

c. Petitioner also argues (Pet. 14) that the Board contravened *Bill Johnson's* by "review[ing] all the evidence" and "ma[king] numerous credibility and demeanor based decisions in favor of one party over another." The Board's determination that petitioner's suit was baseless, however, rested upon the legal conclusions of the state courts and petitioner's own statements in its filings with the Illinois Supreme Court and this Court. Pet. App. 110a-113a. The credibility determinations that were made (as relevant here) pertained to the Board's factual finding that petitioner acted with a retaliatory motive, which is fully within the Board's province to adjudicate. See, *e.g.*, *id.* at 44a, 52a n.18, 61a n.21, 62a n.23, 66a n.28.[5]

Nor is there merit to petitioner's related contention (Pet. 13) that the court of appeals erred in faulting petitioner for its refusal to proffer the additional evidence it claimed to possess. *Bill Johnson's* squarely places on the state-court plaintiff the burden "to come forward with any evidence * * * or at least with an acceptable explanation why he cannot present such evidence" demonstrating that its state-law claim has a reasonable basis or that genuine issues of material fact remain. 461 U.S. at 746 n.12; see also *id.* at 745-746.[6]

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[5] Petitioner has not sought review of the aspect of the court of appeals' decision pertaining to the retaliatory motive prong of the *Bill Johnson's* test.

[6] Petitioner criticizes (Pet. 17) the court of appeals for not considering the libel per quod claim asserted in its fourth amended complaint. Petitioner, however, did not argue that theory below, and neither the Board nor the court of appeals

In any event, petitioner's narrow challenge to how the Board and court of appeals applied the correct legal standard in this particular case presents no issue of broad or recurring importance meriting this Court's review.

2. Petitioner contends (Pet. 19-25) that the Board's order requiring petitioner to reimburse the Unions for the legal expenses they incurred in defense of the state-court litigation conflicts with decisions of this Court and of the Sixth Circuit. No conflict exists meriting this Court's review.

The award of fees is fully consistent with this Court's precedents. *Bill Johnson's* provided that, when an employer violates Section 8(a)(1) of the Act by filing a baseless lawsuit for a retaliatory motive, "the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses." 461 U.S. at 747.

Petitioner contends (Pet. 19-22) that *Bill Johnson's* allows reimbursement only of "employees," and not the nonemployee union organizers named as defendants in petitioner's state suit. The reference to employee awards in *Bill Johnson's*, however, simply reflected the facts of the case before the Court. Petitioner cites nothing in the opinion's language or reasoning that mandates "a categorical inference by negative implication" (Pet. App. 21a) that the Board is precluded from awarding costs to a union under any

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has addressed the claim. Pet. App. 13a n.12; see also *id.* at 116a, 118a (remedial action required by Board's order confined to allegations "in the third amended complaint or its predecessors"). "It is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).

circumstances. Indeed, because the employees' "right of self-organization depends in some measure on [their] ability * * * to learn the advantages of self-organization from others," *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 532 (1992) (quoting *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)), unions possess derivative rights to engage in organizational activities to protect the employees' underlying right to organize, *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). While the union's derivative rights are not as broad as the employees' rights, they support a limited award of fees that simply reimburses the union for the costs it incurred in defending against a baseless lawsuit that was intended to interfere with the employees' right to organize. Cf. *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964) (Board enjoys "a broad discretionary" power to devise remedies "subject to limited judicial review," so that a remedial order of the Board will be reversed only if it "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act") (citations and internal punctuation omitted). See also *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317, 324-325 (1994), and cases there cited.

Contrary to petitioner's assertion (Pet. 20), the court of appeals' decision accords with those of other circuits. See *Gibson Greetings, Inc.* v. *NLRB*, 53 F.3d 385, 394 (D.C. Cir. 1995) ("The NLRB can award a Union the costs and fees it incurs in defending against an employer's baseless, retaliatory lawsuit only if it determines that the filing or maintenance of the lawsuit was an unfair labor practice."); *Diamond Walnut Growers, Inc.*, 312 N.L.R.B. 61, 71 (1993), enforced, 53 F.3d 1085 (9th Cir. 1995). Petitioner is

correct that the Sixth Circuit declined to enforce a particular attorneys' fee award to a union in *Johnson & Hardin Co.* v. *NLRB*, 49 F.3d 237, 244 (1995). But in that case, the Sixth Circuit had reversed the Board's determination that the employer's state-court lawsuit against the union was baseless and retaliatory. *Id.* at 243-244. The predicate for an award of fees—compensation for the costs incurred by the union in an unlawful lawsuit—was thus absent in *Johnson*, and the Board failed to offer any alternative support for its award. [7] Accordingly, there is no direct conflict between the decision reached in *Johnson* and that in the present case, and any alleged inconsistency in the reasoning of the two opinions does not merit this Court's review.[8]

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[7] The court's statement that the Board erred in finding "no basis for distinguishing between employees and nonemployee union representatives as recipients of reimbursement" was thus dictum. *Johnson*, 49 F.3d at 244.

[8] Petitioner errs in asserting (Pet. 20, 23) that the award of fees is inconsistent with the Board's policy of awarding costs and fees in cases where a party asserts "patently frivolous" defenses in a Board proceeding. See *Tiidee Prods., Inc.*, 194 N.L.R.B. 1234 (1972), enforced as modified, 502 F.2d 349 (D.C. Cir.), cert. denied, 417 U.S. 921 (1974); *Heck's, Inc.*, 215 N.L.R.B. 765 (1974) (supplemental decision on remand). Attorneys' fees and costs are awarded in the latter situation to ensure "speedy access to uncrowded Board and court dockets" by "discourag[ing] future frivolous litigation." *Tiidee*, 194 N.L.R.B. at 1236. The fees in this case were awarded to compensate a party that had been forced to defend against a baseless and retaliatory court suit. Because the remedies serve distinct purposes, the Board could reasonably set different standards for the award of attorneys' fees and costs in each situation. Petitioner's reliance (Pet. 24) on *Montgomery Ward & Co.*, 288 N.L.R.B. 126 (1988), remanded, 904 F.2d 1156 (7th Cir. 1990), modified, 307 N.L.R.B. 764 (1992), is also misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1997

There, the Board upheld an ALJ recommendation not to award a nonemployee union organizer legal expenses where the employer's actions enjoyed "some debatable support." *Id.* at 194-195. Further, the cases relied upon by the ALJ in that case for the proposition that the Board can award legal expenses only to employees were subsequently overruled by the Board. See *Johnson & Hardin Co.*, 305 N.L.R.B. 690, 693 (1991), enforced in part & order vacated in part, 49 F.3d 237 (6th Cir. 1995).

Supreme Court, U.S.
FILED
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GESKE & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board impermissibly expanded the rights of non-employee union organizers to engage in derivative Section 7 protected activity under *Lechmere, Inc. v. NLRB* and *Bill Johnson's Restaurants, Inc. v. NLRB*, by finding an employer's libel lawsuit against a stranger labor union is an unfair labor practice, before the state trial court resolves motions for summary judgment, but after the state trial court has both found the libel tort not preempted by federal jurisdiction and has denied the union's motion to dismiss.

2. Whether under *Lechmere, Inc. v. NLRB* and *Bill Johnson's Restaurants, Inc. v. NLRB*, the National Labor Relations Board may order reimbursement of attorney's fees and costs as a derivative Section 7 remedy in favor of a non-certified "stranger" labor union, whenever its evidentiary scrutiny finds that the employer's state tort complaint against the union is for retaliatory purposes, rather than for frivolous or illegal purposes as set forth in *NLRB v. Food Store Empl., Local 347.*

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Respondents.

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Associated Builders and Contractors, Inc. ("ABC" or the "Amicus") is a national trade association representing more than 19,000 construction industry firms located in 79 chapters throughout the country. ABC members include both unionized and "open shop" firms, who share the belief that construction work should be awarded and performed on the basis of merit, regardless of labor affiliation.

ABC strongly supports the right of contractors to compete for work without being subjected to threats, injurious

falsehoods or intimidation by outside agents, including by labor organizations. It is a fact of industrial life, however, that conflicts may occur where labor unions resort to pressure tactics which exceed the legal boundaries. Such tactics may cause harm for which there is no redress available under the National Labor Relations Act.

In these circumstances, it is a constitutionally protected right of employers to resort to the courts for protection from the destruction of their businesses. This Court recognized the importance of that constitutional right in ***Bill Johnson's Restaurants v. NLRB***, 461 U.S. 731 (1983), holding that the NLRB should not be permitted to enjoin court suits brought by employers against their own employees, except in extraordinary circumstances.

In the years since ***Bill Johnson's*** was decided, ABC is concerned that the Court's holding has been improperly transformed from a shield protecting most good faith litigation, into a sword used to punish employers who exercise their constitutional rights to petition the courts for relief. In particular, whereas ***Bill Johnson's*** restricted employers' ability to file baseless suits solely for the purpose of retaliating against their own employees, the National Labor Relations Board has sought to expand the Court's holding into a broad prohibition against suing ***unions***, regardless of whether the unions represent any of the employer's employees or are merely strangers to the workplace. Similarly, whereas ***Bill Johnson's*** was squarely grounded upon the desire to protect employee rights under Section 7 of the National Labor Relations Act, the NLRB has expanded the Court's holding into a protection of unions in general, notwithstanding the omission of labor organizations from the protections of Section 7.

The courts of appeal have not uniformly supported the NLRB's expansion of the holding of ***Bill Johnson's Restaurants***, and a conflict in the circuits has developed. Meanwhile, the NLRB has carved out a significant and unwarranted exception to the "American Rule" of litigation, at least where unions

are concerned. Employers who bring legal action against labor organizations are now faced with the prospect of having to pay the unions' attorneys fees in addition to the employers' own, in a significant departure from traditional notions of fee payments under the NLRA.

This case represents an important opportunity for the Court to clarify and limit the reach of ***Bill Johnson's Restaurants v. NLRB***. The small employer in the case, Geske & Sons, Inc. did not sue its employees or engage in any other action interfering with employee rights under Section 7 of the NLRA. Rather, the employer sought to defend its business in court against injurious falsehoods spread by an outside "stranger" labor union, which was threatening the destruction of the company. The NLRB, supported by the Seventh Circuit, enjoined the employer's state court lawsuit and ordered the payment of attorneys fees to the union for the court action.

ABC as amicus supports each of the reasons for granting the writ of certiorari set forth in Geske's Petition. ABC is submitting this brief, however, to highlight in particular the importance of the conflict in the circuits over the NLRB's expansion of the holding of ***Bill Johnson's Restaurants*** into an unwarranted fee shifting device giving unions an inappropriate advantage in civil litigation. The NLRB's holding in this case, and that of the Seventh Circuit, should be reversed.

STATEMENT OF THE CASE

ABC adopts the statement of the case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Decisions of the Board and the Seventh Circuit Have Created a Conflict Within the Circuits By Imposing Unwarranted Penalties Upon Employers Who Exercise Their First Amendment Right to Seek Redress in the Courts For Harm Inflicted Upon Them by "Stranger" Labor Unions.

Section 7 of the National Labor Relations Act provides that "*[e]mployees* shall have the right to self-organization, to form, join or assist labor organizations." Section 8(a)(1) of the Act provides that it "shall be an unfair labor practice for an employer to interfere with, restrain, or coerce ***employees*** in the exercise of the rights guaranteed in section 7 [of the Act]." (emphasis added). Based upon this language, in ***Lechmere, Inc. v NLRB***, 112 S. Ct. 841 (1992), this Court reaffirmed that "by its plain terms ... the NLRA confers rights only on ***employees***, not on unions or their nonemployee organizers." (emphasis in original). The Court ordered the Board to dismiss charges based solely upon alleged employer interference with non-employee unions, in the context of handbilling and picketing.

Since the Supreme Court's decision in ***Lechmere***, the Board and appellate courts have generally adhered to the Court's holding, outside the context of state court litigation, refusing to find unfair labor practices against employers based upon charges brought solely on behalf of non-employee labor organizations. ***See Makro, Inc.***, 316 NLRB 1160 (1995), ***enf'd***, 74 F. 3d 292 (D.C. Cir. 1996); ***see also NLRB v. Great Scot, Inc.***, 39 F. 3d 678, 682 (6th Cir. 1994); ***Sparks Nugget, Inc. v. NLRB***, 968 F. 2d 991 (9th Cir. 1992)

Similarly, in its interpretation of the Supreme Court's holding in ***Bill Johnson's Restaurants v. NLRB***, 461 U.S. 731 (1983), the NLRB has until recently confined its findings of unfair labor practices to retaliatory employer lawsuits against employees. ***See Montgomery Ward Co.***, 288 NLRB

126, 195 (1988)("[In] the cases where the Board has awarded litigation expenses for civil or criminal court proceedings resulting from an employer's unlawful conduct, such awards have uniformly been given to employees. None of the cases involve non-employee union representatives.").

Certainly, nothing in the ***Bill Johnson's*** case itself authorizes the Board to find a violation of Section 8(a)(1) arising out of a lawsuit against a union which does not represent or act on behalf of the litigating employer's employees. In ***Bill Johnson's***, the employer filed suit against several of its *own employees* for libel and mass picketing. The Court repeatedly stated in its holding that the purpose of the decision was to protect largely defenseless employees against the coercion inherent in baseless and retaliatory litigation. Unions, on the other hand, in addition to being unprotected by Section 7 of the Act, are quite capable of defending themselves and are frequent litigants in court. They are in need of no special privileges under the NLRA with regard to attorneys fees.

Since ***Bill Johnson's Restaurants***, those NLRB cases applying its doctrine to defendant unions have almost always arisen in the context of the unions' representation of the litigating employers' own employees, or have involved lawsuits which the Board could at least argue were indirectly aimed at employees. Thus, in ***Diamond Walnut Growers***, 312 NLRB 61, *enf'd*, 53 F. 3d, 1085, 1087-90 (9th Cir. 1995), the union which was sued by an employer in fact represented the employer's employees and was engaged in a strike against the employer on behalf of those same employees. It was only in this far different context that the Board and the Court of Appeals held that a suit against that union violated the Act, because the suit really was directed against the employees themselves.

This distinction was made clear in the Ninth Circuit's opinion as follows:

> The Board does not contend that the lawsuit violated the Union's Section 7 rights, but rather maintains that, by suing the Union Diamond interfered with *its employees'* exercise of their Section 7 rights. (emphasis added).
>
> * * *
>
> *While not all suits against unions interfere with the employees' exercise of their Section 7 rights*, we agree with the Board that under the circumstances here, Diamond's punitive damages suit against the Union did. (emphasis added).
>
> * * *
>
> Filing *this lawsuit* ... had an inevitable impact on *the employees who were exercising their Section 7 right to strike.* (emphasis added).

53 F. 3d at 1089-90.

The Ninth Circuit clearly acknowledged this Court's holding in ***Lechmere, supra***, and carefully limited the types of litigation against unions which could properly be the focus of a ***Bill Johnson's*** type unfair labor practice case. By contrast, in the present case, nothing about Geske's lawsuit against the Unions had an "inevitable impact" on the exercise of Section 7 rights by any employees of Geske. The Seventh Circuit's broad opinion clearly creates a conflict with that of the Ninth Circuit by placing no restrictions whatever upon the Board's right to impose liability on an employer for suing a union.

A similar direct conflict exists between the present case and the Sixth Circuit's holding in ***Johnson & Hardin Co. v. NLRB***, 49 F. 3d 237, 244 (6th Cir. 1995). In ***Johnson & Hardin***, the Sixth Circuit squarely held that it was improper to award attorneys fees to an outside labor organization which had successfully defended against an employer's trespass action in state court.

The court rightly referred to the award of attorneys fees as a "harsh remedy" and found it to be unjustified under the NLRA.

The Seventh Circuit improperly dismissed the *Johnson & Hardin* opinion for its "brevity" but gave no rational basis for distinguishing the Sixth Circuit's holding. The Sixth Circuit's decision was grounded in the plain language of *Bill Johnson's* itself. Underlying the court's holding was the recognition of the completely different circumstances between labor unions as court defendants, and individual employees, particularly where the unions are not acting as the employees' representatives.[1]

The Sixth Circuit in *Johnson & Hardin* correctly identified the standard which should be applied to attorneys fees demands by outside labor organizations, and which had previously been applied by the NLRB and the courts until recently. Specifically, attorneys fees should only be awarded to a defendant in unfair labor practice litigation when there has been a "clear and flagrant violation of the law" such that the award of attorneys fees is necessary to "discourage future frivolous litigation." Such was the holding of *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), *enf'd as mod., Intl. Union of Elec., Radio, and Mach. Workers, AFL-CIO v. NLRB*, 502 F. 2d 349 (D.C. Cir.) *cert den.*, 417 U.S. 921 (1974); *see also Lang Towing, Inc.*, 201 NLRB 629 (1973).

The Seventh Circuit's holding conflicts directly with this previous standard for the award of attorneys fees by transforming such awards from extraordinary circumstances to ordinary occurrences. As a result, the First Amendment rights

---

[1] The case of *Gibson Greetings, Inc. v. NLRB*, 53 F. 3d 385, 394 (D.C. Cir. 1995), cited by the Seventh Circuit, does not support the proposition that *Bill Johnson's* authorizes unfair labor practice findings against employers who sue "stranger" labor organizations. The union who successfully defended itself in *Gibson Greetings* was the representative of the employer's employees, who won an action under Section 301. Even so, the union was denied any attorneys fees by the D.C. Circuit.

of employers to seek redress in the courts against union misconduct is being chilled.

The chilling of employer rights is exacerbated here, and an additional conflict created, because the decisions below have replaced the "sham" pleading standard of ***Bill Johnson's*** with a new "likelihood of success" test, contrary to the instructions of this Court. ***See*** Geske Petition at 10-19. As this Court most recently held in ***Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.***, 508 U.S. 49 (1993), ***Bill Johnson's*** was intended only to bar employers, like those seeking First Amendment protection under the antitrust laws, from filing suits which are "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."

See also USS Posco v. Contra Costa County Bldg. & Constr. Trades Council, 31 F. 3d 800, 804 (9th Cir. 1994)(denying attorneys fees to union under antitrust laws and referencing ***Bill Johnson's*** standard); and ***Brown & Root, Inc. v. Louisiana State AFL-CIO***, 10 F. 3d 316, 325 (5th Cir. 1994). In the present case, the Seventh Circuit permitted the NLRB to engage in its own factfinding determinations, with 20/20 hindsight, to find that Geske's good faith litigation in defense of its business constituted an unfair labor practice.

Amicus ABC and others in the business community are alarmed at the NLRB's expansion of ***Bill Johnson's Restaurants*** into a weapon for unions, as opposed to a protection for employees. As has been widely documented, unions have in recent years increased their reliance on pressure tactics which are beyond the scope of the National Labor Relations Act, and which can only be redressed through the courts. Such tactics have included "corporate campaigns," trade libel, "salting," violence, and other forms of civil conspiracies, and have often been undertaken by well financed outside labor organizations, without participation or support by employees. ***See*** Northrup, *Construction Union Programs to Regain Jobs: Background*

and Overview, XVIII Jnl. of Lab. Res. 1 (1997); ***See also*** *"Labor's New Assault,"* Nation's Business 16 (June 1997).

Employers must be permitted to defend their businesses in court without the added burden of having to pay the attorneys fees of a defendant labor union whose financial resources may exceed those of the employer. The Seventh Circuit and the NLRB have ignored both the First Amendment and the realities of the workplace, as well as this Court's decisions in ***Lechmere*** and ***Bill Johnson's***, in reaching the wrong result.

CONCLUSION

The Court's intervention is urgently needed to prevent the transformation of ***Bill Johnson's Restaurants v. NLRB*** into a punitive device giving an unwarranted advantage to litigants who are in need of no such special protection, i.e., outside labor organizations. The writ should be granted so that the decision of the Seventh Circuit and the NLRB can be reversed.

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July 2, 1997

(4)

No. 96-1740

Supreme Court, U.S.
FILED
JUL 23 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GESKE & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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No. 97-1740

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GESKE & SONS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF OPERATING ENGINEERS, NO. 150; CHUCK AUGUST, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Petitioner Geske & Sons, Inc. ("Geske") respectfully submits this reply to the brief of the respondent National Labor Relations Board ("NLRB" or "Board") in opposition to Geske's petition.

I.
DENIAL OF THE PETITION WILL UNDERMINE CAREFULLY CONSTRUCTED PROTECTION FOR THE RIGHT TO REDRESS GRIEVANCES IN DISREGARD OF THE COURT'S DECISIONS IN *BILL JOHNSON'S RESTAURANTS* AND *LECHMERE, INC.*

The Board unquestionably had the burden to demonstrate it assumed jurisdiction over the state lawsuit in a manner that 1) did "not deprive a litigant of his right to have genuine state law legal questions decided by the state judiciary," *Bill Johnson's Restaurants*

v. NLRB, 461 U.S. 731, 746 (1983), or 2) intervene "if there is *any realistic chance* that the plaintiff's legal theory might be adopted," unless the theory "is plainly foreclosed as a matter of law or is otherwise frivolous." *Id.* at 747. The General Counsel's opposition demonstrates that the Board has developed a new mechanism for evaluating cases of this kind and has bypassed the considerations carefully laid down by the Court. The Board's opposition is based on its newly stated legal position that Geske "was unlikely to succeed on its trade libel claim." Opp. at 7.

The new test articulated here is not used by the Board in the instant case or in accordance with this Court's directions in *Bill Johnson's Restaurants, Inc.*. As in *Metropolitan Life Ins. Co. v. NLRB*, 380 U.S. 438, 444 (1965), where counsel for the Board articulates a rationale for the Board's Order that the Board itself had not explained, the Court rejected the *post hoc* argument: "[f]or reviewing court's to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review."[1]

The General Counsel's opposition goes further and asserts that Geske has not claimed that the union's underlying activities were not "protected by the Act." Opp. at 7. Geske filed unfair labor practice charges with the General Counsel on August 31, 1991, App. 55a, alleging that these activities violated the Act. The General Counsel dismissed most of those charges without a hearing. Hence, the question whether the union's actions were lawful is not properly raised by the General Counsel. *NLRB v. United Food & Comm. Workers Union, Local 23*, 484 U.S. 112 (1987).[2]

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[1]"It is well settled that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfg's Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

[2]The General Counsel states that Geske does not seek review of the related question of intent to retaliate against protected union activity. Rep. at 7. The Questions Presented fairly comprise the twin aspects of Board error in

(continued...)

On the contention that review is not merited on the claim of error by Geske that its case "was not 'based on intentional falsehoods or knowingly false claims,'" Opp. at 7, the quote objected to by the Board is this Court's actual language in *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 743, setting the standard for review under the NLRA. Pet. at 11.

On the contention that Petitioner "was unlikely to succeed on its trade libel claim" because the language of the picket signs "was not in dispute," Opp. at 7-8, the Board focuses solely on the printed words and not the conduct and statements of the business agents to customers for which the signs displayed the union's misuse of the words "on strike." Geske's first and amended complaints corroborated the oral misstatements and untruthful conduct of union business agents with the misuse of the signs. The Board does not contest Geske's fundamental Illinois trade libel argument that the union's conduct and statements to customers, noted by the ALJ (but not resolved in her opinion), present genuine issues of fact that Geske had every reason to believe the signs could support. App. at 57a.

The argument that "every court" involved with this case has concluded that Petitioner "had no realistic chance of success on the merits," is also not correct. Opp. at 8. Since *no court* or *the Board* ever articulated and applied the "realistic chance" test that the Board for the first time recognizes here is the right test, the observation is not supportable. Moreover, the Illinois court decisions reprinted in the Appendix to the Petition (as argued in the Petition at 18 n. 15), never made a determination of the merits of Geske's case. The long line of Illinois cases reflected in Illinois Supreme Court Rule 307(a)-(1) of appellate procedure, that interlocutory appeal decisions "may not be used as a vehicle to determine the merits of a plaintiff's case," is unanswered by the Board, as well as Rule 23 that Geske's case not be cited as precedent. 113a.

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[2](...continued)
finding an unfair labor practice. Geske's Petition explained the two prongs of credibility and state law that were improperly decided. Moreover, this issue is within Supreme Court Rule 14.1(a): "The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein."

How the state court renders judgment is critical to *Bill Johnson's Restaurants*. The Court stated that "the Board should allow such issues to be decided by the state tribunals if there is any realistic chance that the plaintiff's legal theory might be adopted." *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 747. Since the state court has allowed successive amendments to the pleadings, it is unlikely it would have done so if Geske's amendments were futile.

On the Board's opposition that the decision below does not conflict with the Third, Fifth, and Ninth Circuits that applied the antitrust "sham" principle of "no realistic chance of success on the merits" to labor cases arising in their Circuits, because "[t]hat is merely another way of articulating the *standard applied by the Board* and the court of appeals here," Opp. at 8 (emphasis added), the Board points to no principle or standard that it applied at all. Not one sentence in the Board's decision applies that test or a related one. This is the conflict the Board's new process sets forth.

The contention that Geske errs in "faulting" the court of appeals for having not proffered additional evidence at the ALJ hearing, Opp. at 9, fails to assess the magnitude of the evidence Geske did offer to show the presence of genuine issues of law and fact. That presentation included preparation of a Stipulation of Facts, three volumes of pleadings, and nine volumes of testimony for the ALJ. App. at 112a n.72. However, neither the ALJ nor the Board looked to establish any such genuine issues in its review of these materials as Geske had. The Board quotes a portion of this Court's decision in *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 746 n.12, which refers to a respondent's responsibility to "come forward with *any* evidence." Opp. at 9. The responsibility to show genuine issues of law or fact is met when any portion of the libel turns on a "credibility issue" or "inferences to be drawn from undisputed facts." 461 U.S. at 746 n.12. The ALJ decision is replete with such references.

Finally. the Board contends the libel and slander per quod claims in Geske's Fourth Amended Complaint are beyond the Court's review. Opp. at 9 n.6. That pleading is a part of the judicial record here by the Seventh Circuit's grant of judicial notice to the pleadings from the companion case into this one, *Geske &*

Sons, Inc. v. Zipp, 154a, over the Board's objection. *See* Pet. at 18 n.15. Moreover, the Board based its decision on the Third Amended Complaint, 118a, and not the Fourth. The point highlights the fact that if the Board does not await the outcome of the state suit at the summary judgment stage, the parties remain obligated to proceed to judgment in the state court and to comply with pretrial rulings to narrow pleadings. That the Board cannot keep up with advancements in the state court corroborates the danger of premature Board interference.

The Board's failure to consider the constitutional right of access to the courts is another reason to grant Geske's petition. Nowhere in the opposition or the Board's decision is there a reference to its federal "usurpation" of this fundamental right at all. *See Printz v. United States*, No. 95-1478, 1997 U.S. LEXIS 4044 at 14, 17 (June 27, 1997). Because of *Geske & Sons, Inc.*, the Board may easily infringe on First Amendment rights and "separate state sovereignty" by preempting employer lawsuits, forcing the conduct of hearings, issuing bad state law rulings, *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237 (6th Cir. 1995), and making evidentiary evaluations as it sees fit, without preserving the state right to resolve the merits.[3]

II.

THE BOARD HAS STRETCHED THE CASELAW TO CONVEY SPECIFIC SECTION 7 PROTECTION AND REMEDIAL RIGHTS TO NON-CERTIFIED LABOR ORGANIZATIONS.

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[3]The "spin" placed on the state court proceedings is clearly evidenced. The ALJ discounted Geske's success in obtaining a temporary restraining order as evidence of no merit, whereas the speculation of counsel in papers filed before the appellate courts as to the prospect of the case, is. 111a. She also found that there was no libel (the state courts have yet to decide) despite the existence of admitted untruthful statements that union agents misled Geske's customers. 57a. And, the ALJ resolved credibility issues to determine that the message Local 150 was sending was not trade libel. The Board is entitled to no judicial deference when it interprets provisions of any statute but the NLRA. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

The opposition highlights the very specific conflict between the Circuits arising from the Board's quiet change of the attorneys' fee standard. While the Board contends that the conflict between the Sixth and Seventh Circuits on the issue of an award to a non-certified labor organization does not merit review, Opp. at 10, it distinguishes the award in *Bill Johnson's Restaurants, Inc.*, to *employees* as reflecting the facts in the case. This interpretation accepts the Seventh Circuits' observation that the Court's repeated statements of concern for protecting employees in *Bill Johnson's Restaurants, Inc.*, did not prohibit awards to labor unions by negative implication. Opp. at 10. The citation does not support the inference relied upon by the Board as the Court resolved it in *Lechmere, Inc.*, 502 U.S. 527 (1992)

The self-organization right of employees to learn about the ability to organize "only" extends rights to nonemployee organizers, when the employees are inaccessible. 502 U.S. at 538 The Court did not confer direct "derivative rights" on these nonemployee unions as the Board contends. Opp. at 11. Rather, there is "a distinction 'of substance' between the union activities of employees and nonemployees." *Lechmere, Inc.*, 502 U.S. at 537." That distinction is not available to cloak nonemployee organizers with Section 7 rights. In *Lechmere, Inc*, the Board "was not permitted to engage in that balancing" of rights between the two groups. The Court was clear that no restriction on employee self-organization may be placed on employees by an employer, while "'*no such obligation is owed nonemployee organizers.*'" *Id.* at 533 (*quoting Babcock & Wilcox*, 351 U.S. 105, 113 (1956)) (emphasis added).

The Board's statement that the union's derivative rights "support a limited award of fees" treats the nonemployee organizers as if they were "employees" with Section 7 rights. Opp. at 11. That objective is contrary to the language of Section 7 and effectuates no policy described by the Act any more than giving the right of entry onto employer property to non-employee organizers would have. In both cases, the union assumes liability as an ordinary corporate citizen for the responsibility of organizing. It would be anomalous for the *Lechmere, Inc.* Court to reject the Board's argument that learning the advantages of self-organization overcomes the tort of

trespass and remedial attorneys' fees, while now permitting that same purpose to overcome the employer's tort of libel and incur attorneys' fees.[4]

In fact, in *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 747 (emphasis added), the Court showed that the award of fees was appropriate if the employer's lawsuit "had been filed for the exercise of the *employee's* Section 7 rights." The Board's extension of the Court's rule to include *non-employee* organizers' derivative rights cannot be supported by the Court's language. It is also not supported by the Board's previous position to the Court in *Breininger v. Sheet Metal Workers International Union*, 493 U.S. 67, 73-74 (1989), where it described Section 7 as a statutory restraint even on certified bargaining representatives. That position on the union's obligation to assume a duty of fair representation could only be possible if the union possessed no original statutory rights.

The General Counsel also quarrels with the discrete Circuit conflict in the power to assess fees and costs in favor of a labor organization where it is or is not a certified bargaining representative. The Sixth Circuit in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995), could not have been more clear in its decision that the Board had no such authority when the union was not the employee representative.

As *amicus curiae* Associated Builders and Contractors, Inc. points out, Br. at 8, the Board's decision imposes a harsh restraint on the exercise of the constitutional right of access. It demonstrates the extraordinary consequences to the economic health of employers if attempting to protect their non-preempted rights in state court causes them to be responsible, not from fees under the "good faith"

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[4]Thirty years ago in *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 63 (1966), the Court stated that "[a]fter all, the labor movement has grown up and must assume ordinary responsibilities...and unions should adopt procedures calculated to prevent such abuses." The Board has not been concerned with the defamatory quality of Local 150's statements towards Geske because it "has no relevance to the Board's function." *Id.* The issue would be considered by the state court under Restatement (Second) of Torts § 580B.

provisions of the American Rule (unsettled law and corresponding Rule 11-like obligations of counsel), but under interlocutory threat of certain imposition of fees and costs from the Board. Br. at 2.

The defining example of where the Board has now gone, is the contention that it has established a "different standard for the award of attorneys' fees and costs," between "patently frivolous" cases and to "compensate a party." Opp. at 12 n.8. The former situation it states ensures speedy access and discourages frivolous litigation; the latter is imposed for baseless and retaliatory state litigation. The remedies allegedly serve "distinct purposes" for each situation. Why and under what authority cases have been "subsequently overruled by the Board" that would provide the basis for granting fees to labor unions under this "standard," such as overturning *Montgomery Ward & Co.*, 288 N.L.R.B. 126 (1988), is not explained in any decision. Opp. at 13 n.5. The alleged distinction is not meritorious.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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Supreme Court, U.S.
FILED
JUL 31 1997
CLERK

No. 96-1740

In the Supreme Court of the United States

OCTOBER TERM, 1996

GESKE AND SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1740

GESKE AND SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

On July 18, 1997, the United States Court of Appeals for the District of Columbia Circuit issued a decision in *Unbelievable, Inc.* v. *NLRB*, No. 96-1209.[1] That case addresses the Board's authority to assess attorney's fees against a party that presents a frivolous defense during a Board proceeding. The Board's power in this regard was discussed at page 12, note 8 of the Board's brief in opposition.

Although *Unbelievable* limits the Board's authority to sanction parties who assert frivolous defenses

[1] The decision is reprinted in the appendix to this memorandum.

in Board proceedings,[2] both the majority and the dissent in *Unbelievable* reaffirmed the Board's power to award attorney's fees as damages when a party commits an unfair labor practice by filing a baseless lawsuit in retaliation for an exercise of rights protected by the National Labor Relations Act (Act). See App., *infra*, 26a-27a n.*** ("[I]f a respondent before the Board files a baseless lawsuit against the charging party in retaliation for the latter's exercise of its rights under the [Act], then the prosecution of that lawsuit is itself an unfair labor practice, remediable by an order that the respondent cease and desist and pay the costs of defending against the baseless lawsuit."); *id.* at 39a (Wald, J., dissenting). The court of appeals' decision in *Unbelievable* thus further undercuts petitioner's suggestion (Pet. 20) that the courts of appeals are in conflict over the Board's power to order the reimbursement of attorney's fees that a party protected by the Act incurs in defending against a separate, baseless and retaliatory lawsuit. See also Brief in Opp. 11-12.

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[2] The Board intends to petition for rehearing and to suggest rehearing en banc in *Unbelievable*.

* * * * *

For the reasons discussed herein and on pages 11-12 of our brief in opposition, petitioner's claim of a conflict in the circuits is in error, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FREDERICK L. FEINSTEIN
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National Labor Relations Board

JULY 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-1209

UNBELIEVABLE, INC., D/B/A FRONTIER HOTEL & CASINO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PROFESSIONAL, CLERICAL & MISCELLANEOUS EMPLOYEES LOCAL 995 AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501, AFL-CIO, INTERVENORS

[Argued Feb. 18, 1997]
[Decided July 18, 1997]

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: WALD, GINSBURG, and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Dissenting opinion filed by *Circuit Judge* WALD.

GINSBURG, Circuit Judge:

The National Labor Relations Board determined that the Frontier Hotel & Casino committed an unfair labor practice by engaging in surface bargaining with two unions. The Board ordered the Frontier to reimburse the unions for their negotiation costs and to pay the litigation costs—primarily attorney's fees—incurred by both the unions and the NLRB General Counsel. The employer petitions for review, arguing that the Board erred in assessing negotiation costs, that the Board lacks the power to assess litigation costs, and that if the Board does have the power to assess litigation costs, then it erred in assessing them in this case. The Board cross-applies for enforcement of its order. We deny the petition and enforce the order with respect to the payment of the unions' negotiation costs, but grant the petition and deny enforcement with respect to the employer's payment of litigation costs.

I. Background

Unbelievable, Inc., purchased the Frontier Hotel & Casino, located on the Las Vegas Strip, in 1988. The International Brotherhood of Teamsters and the International Union of Operating Engineers each represented certain groups of employees at the Frontier. Although the contracts between the Unions and the Frontier's previous owner had expired in 1987, Unbelievable continued to implement the terms of the expired contracts for some time. In April 1989, however, Unbelievable imposed new contract terms upon the two groups of employees represented by the Teamsters.

In May 1990 Unbelievable hired Joel I. Keiler to negotiate new contracts with both Unions. Keiler has long had a troubled history. He was briefly suspended from the practice of law in the District of Columbia, *see Matter of Keiler*, 380 A.2d 119 (D.C. 1977), and he has run afoul of the Board on several occasions. *See, e.g., Pepsi-Cola Bottling Co.*, 315 N.L.R.B. 882 (1994); *CWI of Maryland, Inc.*, 321 N.L.R.B. No. 101, 1996 WL 395875 (1996). In March 1995 Keiler was suspended from practicing before the Board for one year because of his misconduct in representing another Las Vegas casino. *See In re Joel I. Keiler*, 316 N.L.R.B. 763. *See also NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995) (sanctioning Frontier and Keiler for filing frivolous appeal).

After Unbelievable hired him, Keiler asked the Federal Mediation and Conciliation Service to set up meetings between the Company and the Unions. Keiler and the mediator each left messages for Robert Fox, who represented the Operating Engineers, and for Richard Thomas, who represented the Teamsters, but they were unable to set up a meeting. Although the Company had not yet informed the Unions that Keiler represented it, he sent letters to both Fox and Thomas in late June complaining about their lack of response to his overtures. He enclosed with the letters proposed contracts and wrote that if they did not contact him in order to arrange a bargaining session by August 1, then the Frontier would implement the proposed terms unilaterally.

The proposed contracts were significantly less attractive to the Unions than were their previous contracts. For example, the Company proposed to re-

duce the wages of some Teamsters to $6.50 per hour from $11.92 per hour, and to cut by 5% the wages of most employees represented by the Operating Engineers. Both proposed contracts would have made it difficult for an employee ever to receive holiday or vacation pay, eliminated the pension plan, and substituted a new health plan for those of the Unions.

Keiler and the Operating Engineers held three bargaining sessions from July to November. At the first meeting Fox told Keiler that the proposals were so outlandish that no union would ever agree to them and Keiler (according to Fox, whom the Board credited) responded that the Frontier's General Manager did not care and would not mind if the proposals led to a strike. Keiler did not consider the Union's counter-proposal, which closely paralleled the terms of the standard union contract in use on the Las Vegas Strip. Little happened at the second meeting. At the third meeting Keiler declared the two sides at an impasse and told Fox that the Company would implement its proposal, to which Fox responded that they were not at an impasse because the Company had not bargained in good faith. Keiler did later agree to retain the union's health and welfare plan, but on December 1, 1990 the Company implemented the other terms of its proposal.

Negotiations with the Teamsters followed a similar course. Of the discharge language in the proposal, Keiler said (according to Thomas, whom the Board credited), "It means we can virtually fire anybody for anything." Again Keiler indicated that the Frontier's General Manager wanted a strike so that he could replace the employees and get rid of the Unions. Keiler did agree to some changes—for

example, in the vacation and holiday pay proposal—and the Union agreed to certain of the Company's minor proposals. After the union membership unanimously rejected the proposal in a secret ballot vote, Keiler told Thomas that the Frontier would implement its proposals unilaterally if the Teamsters did not accept them by November 1. Again Keiler later agreed that the Company would continue contributing to the Union's health insurance plan, and again on December 1 the Company implemented its other proposals.

The Unions filed unfair labor practice charges with the Board. After several days of hearings, an Administrative Law Judge issued findings and conclusions in May 1992. The ALJ held that the Company violated §§ 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, by failing to bargain with the Unions in good faith and by unlawfully discharging a union supporter. The ALJ dismissed the charges that the Company had unlawfully withheld certain information from the Unions and that it had unlawfully withdrawn its health plan.

The charge that the Company had not bargained in good faith consumed the bulk of the hearing and of the ALJ's recommended order. Because he found that Keiler's testimony was not credible, the ALJ relied for his factual findings almost entirely upon the testimony of the General Counsel's witnesses. The ALJ concluded that Keiler's negotiation strategy was to reach an impasse so that the Company would be able to implement its proposals unilaterally and force the Unions into a strike. First, Keiler submitted a proposal that differed substantially from the previous contract and gave the Union only a month to respond

to it. Second, the Company did not promptly inform the Unions that Keiler was representing it. Third, Keiler's use of the federal mediator "seems to [have been] designed only for the purpose of setting the foundation for an argument that it was the [Frontier] which was operating in good faith by first contacting the mediator." The ALJ, finding that Keiler, at the Frontier's direction, never really sought to reach agreement with the Unions, deemed the Company's conduct "classic surface bargaining."

The Board adopted the ALJ's factual findings and conclusions of law. Further, the Board held that it would require the Company to pay the Unions' negotiating expenses because the Company had "engaged in egregious and deliberate surface bargaining" with the Unions, which "unnecessarily diminished their economic strength." *Unbelievable, Inc.*, 318 N.L.R.B. 857 (1995). The Board explained:

> In cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies . . . an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.

Id. at 859.

Applying this standard to the ALJ's findings, the Board determined that through Keiler the Frontier had engaged in "deliberate and egregious bad faith conduct aimed at frustrating the bargaining process." *Id.* at 858. In particular, the Board stressed (1) Keiler's pre-negotiation conduct; (2) the wide gap between the status quo and the Company's initial proposals; and (3) Keiler's conduct at the bargaining table. The Board concluded that because Keiler "lost no opportunity to goad the Unions to strike," his "conduct rendered the bargaining between the parties merely a charade." *Id.* Accordingly, the Board ordered the Frontier to pay the expenses incurred by the Unions for their fruitless negotiations with Keiler.

The Board also required the Frontier to pay both the Unions' and the General Counsel's litigation expenses: the Company's presentation of frivolous defenses "depleted the [Unions'] resources" and "needlessly wasted" those of the Board; and compensation was required because "even a bargaining order accompanied by reimbursement of the charging party's negotiation expenses is insufficient to restore a charging party's economic strength and to ensure meaningful bargaining." 318 N.L.R.B. at 857, 862. The Board explained further that its policy is to order a respondent to pay the charging party's litigation expenses "only where the defenses raised by the respondent are frivolous rather than debatable." *Id.* at 860. Constrained by the principle that "Board orders must be remedial rather than punitive," *id.*, the Board would not order a respondent to pay the charging party's litigation expenses if the respondent's defense turned upon an issue of credibility

or if the respondent raised any defense that was not frivolous. In the present case, however, credibility was only technically at issue; Keiler's incredibility was so apparent that ordering the Company to pay the Unions' litigation expenses was consistent with the applicable principles, if not with the Board's precedents. *Id.* at 861. In addition, the Board noted that, although two of the charges filed against the Frontier were dismissed—indicating that the Company's defenses to those charges were hardly frivolous—the charges themselves were insignificant compared to the charge of surface bargaining, which had been the dominant subject of the hearing.

Because the Company's "sole defense" to the charge of surface bargaining rested upon Keiler's testimony, the Board focused upon his part in the hearing. Keiler's testimony, particularly during cross-examination, was "unresponsive, aggressive, and flagrantly disrespectful." 318 N.L.R.B. at 860. For example, when asked whether he was getting paid for his time testifying, Keiler responded, "Who knows what's going to happen? We could all be dead tomorrow." When shown a document and asked "How did you arrive at the writing on the right-hand corner here?" Keiler responded, "By airplane." The Board concluded that Keiler's conduct as a witness showed "his intent to make a charade of this proceeding." *Id.* The Board also stated that "Keiler's flagrantly unlawful course of conduct as the [Company's] agent in negotiations with the Unions" constituted a "further basis" for requiring the Frontier to pay the Unions' litigation costs (although not those of the General Counsel). *Id.* at 862.

II. Analysis

The Company does not contest the Board's conclusions that it violated the NLRA by failing to bargain in good faith and by unlawfully discharging a union supporter. Accordingly, we shall enforce the Board's order insofar as it relates to those charges. In addition, we find substantial evidence in the record supporting the Board's finding that the Company engaged in "aggravated misconduct" during its negotiations with the Unions and we affirm the order directing the Frontier to pay the Unions' negotiation expenses. We also hold, however, that the Board lacks authority under the NLRA to order a respondent to pay the *litigation expenses incurred by a charging party* or by the General Counsel of the Board.

A. Negotiation expenses

The Frontier does not question the Board's authority to order a respondent to reimburse the charging party for negotiation expenses if the respondent's misconduct has been unusually aggravated and its unfair labor practices have infected "the core of the bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies." The Company does argue, however, that there is not substantial evidence in the record considered as a whole to support the Board's findings of fact.

We uphold the Board on this point. As to credibility, we accept the ALJ's finding that Unbelievable lived up to its ill-chosen name. *See Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994) (ALJ's credibility determinations conclusive unless "patently unsup-

portable"). The testimony of the General Counsel's witnesses provides substantial evidence for the Board's finding that the Company did not intend to reach an agreement with the Unions. Keiler's statement that the General Manager of the Frontier wanted the Unions to strike so that he could replace the employees surely qualifies as "aggravated misconduct."

Nonetheless, the Company argues, the order should not stand because (1) the Company has no history of violating the Act; (2) it is not responsible for Keiler's behavior; and (3) the Unions engaged in misconduct as well. None of these challenges has any merit.

First, a respondent's labor history, good or bad, is not a factor that the Board need consider in determining whether to order the respondent to pay the charging party's negotiation expenses. The rationale for ordering a respondent to reimburse the charging party for its negotiation expenses is to restore the charging party to the status quo ante; the respondent's prior record of compliance with the Act is irrelevant to the propriety of such relief. Indeed, to consider the respondent's history would strongly suggest that the assessment of negotiation costs is a punitive rather than a compensatory measure. *Cf. Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940) (NLRA is remedial, not punitive).

Second, although the Company comes not to praise Keiler but to bury him, it cannot escape responsibility for the misconduct of its former attorney. The Frontier argues that the Board erred in focusing upon Keiler's conduct and not upon that of the Company itself in determining whether the employer must pay the Unions' negotiation costs. The Com-

pany's contention ignores the most basic principles of the law of agency. *See* O.W. Holmes, Jr., *The Common Law* 180 (1881) (principal bound by terms of contract formed by agent); *Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1394-95 (D.C. Cir. 1984) (upholding Board in decertifying union due to illegal kickback agreement between union officials and employer), *citing* Restatement (Second) of Agency § 228(1) at 504 (1957). A company may not hire an attorney to represent it in negotiations, and then by claiming ignorance of the attorney's tactics avoid paying the price for the attorney's misconduct.

Finally, the Company argues that the Board should have refrained from granting the Unions an extraordinary remedy because they have unclean hands. For one thing, the Frontier points to the violent behavior of certain members of both Unions while on strike over the past five years; but the conduct of union members after negotiations broke down is not relevant to whether the Company is liable for the Unions' pre-strike negotiation costs. If the Unions are implicated in misconduct by strikers, then the Company may file its own charges against the Unions. For another, the Frontier argues that by insisting upon the terms of the standard Las Vegas Strip contract the Unions were partly to blame for the parties' failure to reach an agreement. The Unions had little reason to do more, however, when Keiler presented his proposals as non-negotiable diktats, *see NLRB v. General Electric Co.*, 418 F.2d 736, 756-59 (1969) (take-it-or-leave-it approach to bargaining in context of anti-union animus violates Act), and informed the Unions that the General Manager of the Company hoped the Unions would

strike so he could hire replacements. As it was, both Unions sought additional meetings even when Keiler could not wait to declare the negotiations at an impasse. In sum, substantial evidence in the record shows that inflexibility on the part of the Unions does not explain, let alone excuse, surface bargaining by the Company.

B. Litigation Expenses

The Board claims that it has the authority, under § 10(c) of the NLRA, to order a respondent to pay the litigation costs—including principally the attorney's fees—incurred by both the charging party and the General Counsel.* The Company argues that the statute is insufficiently specific to authorize a departure from the "American Rule" that (with few excep-

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* In its opinion the Board states that the award of litigation costs is "consistent not only with the American Rule, but alternatively with the bad-faith exception to that rule." 318 N.L.R.B. at 864. Although our dissenting colleague reads this statement as indicating that the Board was relying in the alternative upon its inherent power to control its own proceedings, in its brief the Board relies upon § 10(c) alone for authority to make Unbelievable pay the Unions' attorney's fees. When questioned at oral argument, counsel for the Board explained that the Board's opinion referred to the bad-faith exception to the American Rule not in order to posit an alternative rationale should it lack the power under § 10(c) to assess attorney's fees but only in order to point out that the Board's approach is consistent with the practice of the federal courts. Accordingly, we have no occasion in this case to address whether the Board might have such inherent power notwithstanding its lack of punitive authority (on which, see pp. 20-21).

tions) each side must bear its own legal expenses. *See Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

1. Circuit precedent and the American Rule

For the first 35 years in which the Board administered the NLRA, it never claimed that it had the power to order a respondent to pay the attorney's fees of a charging party. Indeed, it declared that it would be inappropriate for the Board to assess attorney's fees "in the light of the basic principle[] that Board orders must be remedial not punitive . . . [T]he public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable." *Heck's, Inc.*, 191 N.L.R.B. 886, 889 (1971). Nonetheless, having been prompted by this court (when reviewing a different decision), to reconsider its policy, *see Electrical Workers, IUE v. NLRB*, 426 F.2d 1243, 1253 n. 15 (1970), the Board changed its mind, holding in *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), that it did have the authority to shift the burden of attorney's fees in certain cases. When we came to review the decision in *Heck's*, in which the Board had refused to assess attorney's fees against a respondent, the court took the occasion to pre-approve the contrary approach that the Board had later adopted in *Tiidee*. *See Food Store Employees Union v. NLRB*, 476 F.2d 546 (1973).** The court did not, however, analyze

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** The Supreme Court reversed *Food Store Employees* on a different ground, 417 U.S. 1 (1974), expressly declining to "address the question whether the Board's broad powers under § 10(c) . . . to fashion remedies include power to order reimbursement of litigation expenses and excess organizational

whether the Congress had given the Board the authority to order a respondent to pay attorney's fees. Instead, deferring even more than we would today under step II of the analysis in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), the court simply recounted that

> the Board reasoned that the Congressional objective of achieving industrial peace through collective bargaining "can only be effectuated when speedy access to uncrowded Board and court dockets is available. . . . [I]n order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper" to order reimbursement of both the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of the cases before it and the court.

Food Store Employees, 476 F.2d at 550-51, *quoting Tiidee Products, Inc.*, 194 N.L.R.B. at 1236.

Then came *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which, as a leading commentator put it, "alter[ed] dramatically the developing law on attorney's fees." 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil

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costs." *Id.* at 8 n.9. While *Food Store Employees* was pending before the Supreme Court, however, this court had upheld the Board in *Tiidee Products, Inc., sub nom. Electrical Workers IUE v. NLRB*, 502 F.2d 349, (1974). The panel in the latter case considered itself bound by the earlier panel's decision in *Food Store Employees*. Accordingly, although Tiidee is the surviving precedent in this circuit, the reasoning upon which it rests appears only in *Food Store Employees*.

2d § 2675 (1983). In *Alyeska*, the Supreme Court rebuffed efforts by plaintiffs and some courts alike to chip away at the American Rule, declaring categorically that "the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 262. Nor may a court infer a congressional intent to override the presumption that the American Rule erects against the award of attorney's fees without "clear support" either on the face or in the legislative history of the statute. Rather, as the Supreme Court made clear again in *Summit Valley Industries, Inc. v. Carpenters*, 456 U.S. 717, 726 (1982), a court may award attorney's fees only when expressly so authorized by the legislature. In the latter case the unanimous Court rejected the argument that § 303 of the Labor Management Relations Act, 29 U.S.C. § 187, authorizing the courts to award "damages" to an injured plaintiff, allowed for the award of attorney's fees as well: "In the absence of clear support for [that] construction in the language or legislative history of § 303 we decline to adopt such a broad exception to the American Rule." *Id.*

Although the Court in *Summit Valley* dealt not with the NLRA but with a different part of the LMRA and therefore did not overrule our decision in *Food Store Employees*, the Court later indicated that a lower court must consider the implication of *Summit Valley* for the Board's claim of authority to award litigation expenses. Specifically, when the Fourth Circuit became the only court to follow our holding in *Food Store Employees*, the Supreme Court granted certiorari, vacated the judgment, and re-

manded the case to the court of appeals for reconsideration in the light of *Summit Valley*. *J.P. Stevens & Co., Inc. v. NLRB*, 458 U.S. 1118 (1982), *vacating* 668 F.2d 767 (1982). (The case settled before the court of appeals had a chance to reconsider the issue.) At the very least, therefore, we are obliged to ask whether we should follow *Food Store Employees* in the wake of *Summit Valley*.

Clearly, before *Summit Valley*, we had held in *Food Store Employees* that the Board had the authority to assess a losing party for attorney's fees without finding the express statutory authorization that the Court would later, in *Alyeska* and *Summit Valley*, require in order to overcome the presumption that the American Rule applies. Reference to "the Congressional objective of achieving industrial peace through collective bargaining," 476 F.2d at 550, simply does not invoke a clear source of statutory authority for the award of attorney's fees. Although the petitioner emphasized the standard of clarity required under *Summit Valley* in its opening brief the Board tried to distinguish *Summit Valley* with only the inapt observation that, in purported contrast to § 303, "the express terms of Section 10(c) . . . do not limit the Board's broad authority to order appropriate remedial measures to effectuate the policies of the Act." At oral argument the Board was understandably quick, therefore, to embrace Judge Wald's observation that *Summit Valley* may not be controlling here because that case involved attorney's fees awarded by a court, whereas § 10(c) of the NLRA broadly authorizes an administrative agency to remedy unfair labor practices. We see nothing in the rationale of *Summit Valley*, however, to indicate

that it does not apply equally to a statute granting remedial power to an administrative agency.

On the contrary, the wide range of cases since *Food Store Employees* in which the Supreme Court has reaffirmed its adherence to the American Rule gives us reason to believe that the presumption against fee-shifting does apply to the NLRA. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 183-85 (1976) (court may not award attorney's fees under 42 U.S.C. § 1981 for want of express authority; nor is implied authority for such award provided by generalized command of § 1988 to furnish suitable remedies to vindicate rights conferred by Civil Rights Acts); *Alyeska*, 421 U.S. at 271 (reversing grant of attorney's fees to plaintiffs as private attorneys general because only Congress, not courts, can authorize exception to American Rule); *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 126 (1974) (reversing award of attorney's fees under Miller Act because it does not "explicitly provide for an award of attorneys' fees to a successful plaintiff"); *cf. Smith v. Robinson*, 468 U.S. 992 (1984) (discussed below).

Since the Supreme Court first made it clear that only the Congress and not the courts can override the American Rule, the Congress has in recent years expressly authorized fee-shifting in a number of statutory provisions, starting with the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which was passed in direct response to the *Alyeska* decision. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); see also 42 U.S.C. § 12205 (1990) (fee shifting under Americans With Disabilities Act); 29 U.S.C. §§ 216(b) and 626(b) (fee shifting under Age Discrimination in Employment Act).

The Supreme Court, in turn, treats congressional silence in a particular statute as an indication that the legislature did not intend to authorize fee shifting. For example, in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), the Court held that § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607, does not authorize the award to a private litigant of attorney's fees associated with bringing a cost recovery action. Yet § 107 provides rather expansively that a private litigant may recover "any . . . necessary costs of response" and even defines "response" to include "enforcement activities related thereto." The Court, noting its "adherence to a general practice of not awarding fees to a prevailing party absent explicit statutory authority," and observing that the Congress had expressly provided for the award of attorney's fees in certain amendments to the CERCLA, at 818-19, held that § 107 does not provide for the award of attorney's fees "with the clarity required by *Alyeska*." *Cf. Alyeska*, 421 U.S. at 262 (that Congress expressly provides for award of attorney's fees in some statutes is evidence that it did not intend to provide for attorney's fees in other statutes). In *Smith v. Robinson*, 468 U.S. 992 (1984), the Supreme Court again indicated the importance to be attached to the absence of explicit authority for fee shifting in a particular statute (or its legislative history). In that case a student brought a successful claim under the Education for the Handicapped Act, which does not provide for fee shifting, and also under 42 U.S.C. § 1983 and a provision of the Rehabilitation Act, both of which do provide for fee shifting. Disallowing the student's claim for attorney's fees, the Court reasoned that where the EHA is available to a

child asserting a right to public education, that statute provides his sole remedy; to allow him to proceed under provisions that allow for the recovery of attorney's fees would undercut the decision by the Congress not to provide for fee shifting in the EHA. *Id.* at 1012-13, 1020-21.

Moreover, the mechanics of an action to enforce the NLRA suggest that the requirement that the authority to award attorney's fees be express applies *a fortiori* to this statute. The reason is simply this: the charging party's participation in the litigation is strictly voluntary. The union, employee, or employer filing a charge with the Board need not play any role in the proceedings beyond serving the respondent with a copy of the charge. 29 C.F.R. §§ 101.2, 101.4. Although the charging party may, if the General Counsel issues a complaint, participate in the hearing, 29 C.F.R. § 101.10, nothing in the Act or in the Board's regulations requires it to do so. If the General Counsel calls the charging party as a witness, as he called certain union officials in this case, then the General Counsel must pay the witness a fee for his time. 29 C.F.R. § 102.32. In short, a charging party need not incur any litigation expense. Of course, the charging party may (and often does) intervene in the proceedings before the Board, but it does so as a volunteer, not a party haled into litigation willy-nilly. We think it would be passing strange for the court to hold that, although a statute authorizing an individual to bring a court case at his own expense will not be read to authorize an award of attorney's fees absent clear Congressional intent, a statute that provides a federal agency to prosecute a case on behalf of a charging party will be read to authorize the

agency to award that party—should it choose to intervene—its attorney's fees based solely upon the agency's general remedial authority "to take such affirmative action as will effectuate the policies" of the Act. 29 U.S.C. § 160(c).

In sum, since our decision in *Food Store Employees* the Supreme Court has emphasized in several contexts that a federal court is to apply the American Rule unless the Congress has explicitly said otherwise. Nothing in the Court's decisions suggests that the standard set for the courts does not apply equally to a statute giving a federal agency rather than an individual the right to institute proceedings. We did not apply such an exacting standard in *Food Store Employees*; in the light of *Alyeska* and *Summit Valley*, however, we must do so now.

2. The search for "clear support" in § 10(c)

Looking at the issue afresh, then, we find no support for the Board's position in the terms of the NLRA, in its legislative history, or in Supreme Court precedent interpreting the extent of the Board's remedial discretion. Section 10(c) of the NLRA provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

> employees with or without back pay, as will effectuate the policies of [the Act].

29 U.S.C. § 160(c).

In its opinion the Board acknowledges that this section, like the statutory provision at issue in *Summit Valley*, "does not expressly provide for the recovery of attorney's fees." 318 N.L.R.B. at 863. Nevertheless, the Board argues that we should defer to its interpretation of its authority under § 10(c) of the Act. We can defer only so far as "that interpretation is rational and consistent with the statute." *NLRB v. Food & Commercial Workers*, 484 U.S. 112 (1987). It is not rational to interpret congressional silence in § 10(c) as implicitly sanctioning fee shifting when the Supreme Court has expressly stated that fee shifting is allowed only when a statute provides "clear support" for such authority. According to the Board, however, because the NLRA "refrains from particularizing the scope of the Board's remedial powers," and because it "contemplates the exercise of broad discretion by the Board in fashioning a range of remedies suitable to remedy various unfair labor practices," the award of attorney's fees is not inconsistent with the statute. 318 N.L.R.B. at 863. The absence of a prohibition is not, however, equivalent to an authorization, much less "clear support" therefor. As the Supreme Court put the matter in *Runyon*, to determine that the Congress "intended to set aside this longstanding American rule of law" there must be more in the statute than "generalized commands" or a "broad [remedial] commission." 427 U.S. at 185-86.

The Board also relied upon the legislative history of the NLRA, but it succeeded only in showing that it

does not have Clio on its side in this matter. The Senate Labor Committee considered two versions of what is now § 10(c). One version, S. 2926, provided a list of rather specific remedies. The second version, S. 1958, was more general. The Committee pointed out that "to substitute express language such as reinstatement, back pay, etc., necessarily results in narrowing the definition of restitution, which may include many other forms of action." Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress), Senate Comm. Print, *reprinted in* 1 Leg. Hist. 1360 (1935). Incredibly, however, immediately after acknowledging the Committee's point, the Board asserted that, "[a]lthough the final bill in fact substituted 'reinstatement of employees with or without backpay' for 'restitution,' the change was made without any suggestion of an intention to narrow the discretion of the Board in remedial matters." 318 N.L.R.B. at 863. The Congress's substitution of the phrase "reinstatement of employees with or without backpay" in place of "restitution" is hardly evidence (let alone clear support for the proposition) that the Congress intended to authorize the Board to order a respondent to pay the attorney's fees of the charging party and the Board. *Cf. International Union of Electrical, R. & M. Wkrs.*, 502 F.2d at 353 n.* (individual opinion of J. MacKinnon) ("in all the 39 years of legislative history surrounding section 10(c), none of it gives any support for the interpretation that Congress intended to allow the Board to award attorney fees and litigation expenses to prevailing parties").

Because neither the plain text nor the legislative history of § 10(c) provides "clear support" for the

authority of the Board to order the payment of attorney's fees, the Board can argue only that the phrase "such affirmative action . . . as will effectuate the policies of the Act" has been interpreted so broadly by the Supreme Court that it encompasses that remedy in this case. Of course, the Board's remedial power is not limited to the single example of affirmative action instanced in the statute, namely, reinstatement with or without backpay. Still, the other remedies that the Supreme Court has approved are closely related to the expertise of the Board and to its statutory mission. For example, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court held that the Board may issue a bargaining order when (1) a union has shown by informal means that it enjoys majority support among the employees in a unit and (2) the employer's unfair labor practices have so tainted the atmosphere with coercion of the employees as to make it unlikely that the Board could hold a fair election. In contrast, by imposing an award of attorney's fees the Board moves away from its expertise in labor relations and exercises a discretionary power entrusted to a court only when specifically legislated.

The Board's primary justification for ordering the Frontier to pay the litigation costs of its adversaries—namely, its presentation of a frivolous defense to the unfair labor practice charges—is especially problematic for the simple reason that it is not itself an unfair labor practice to present a frivolous defense to an unfair labor practice charge. A *Gissel* bargaining order responds directly to an unfair labor practice, the refusal to bargain. An award of attorney's fees against a party that has

presented a frivolous defense effectuates the policies of the Act only indirectly. Relatedly, the Board strays from its area of expertise when it determines whether fee shifting is appropriate in a particular case. In determining whether to order an employer to bargain with a union, the Board addresses delicate issues of labor-management relations clearly within its delegated purview and its field of expertise. By contrast, in considering whether to order an employer to pay the attorney's fees of a union (or vice versa), the Board focuses not upon the dynamics of the workplace but upon the employer's (or union's) conduct in litigation. *See Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (court does not defer to agency decision in matter outside of agency's expertise).

Not only is there a problem with the nature of the conduct at which the Board's award of attorney's fees is aimed, there is also a problem with the limited purpose for which the Board may award any remedy. The Board gives two rationales explaining why its order effectuates the policies of the Act, but neither of these, nor their combination, is sufficient to overcome the American Rule. First, the Board states that the company's "reliance on frivolous defenses in its litigation of these allegations . . . depleted the Charging Parties' resources." 318 N.L.R.B. at 857. To the extent that the Board is relying upon the idea that a party is not made whole unless it recovers its attorney's fees, however, that is but a criticism of the American Rule—indeed, a criticism that the Supreme Court has heard and rejected. *See Summit Valley*, 456 U.S. at 724-25 ("Even assuming that attorney's fees are necessary to achieve full compensation, this

justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority"), *citing F.D. Rich*, 417 U.S. at 128-29 ("This argument merely restates one of the oft-repeated criticisms of the American Rule"). The Board's "make whole" rationale, therefore, does not show that fee shifting effectuates the policies of the Act.

The Board's other reason for ordering a respondent to pay the attorney's fees of the charging party, to discourage frivolous litigation, is essentially punitive. 318 N.L.R.B. at 860. As counsel put the matter at oral argument, the Board requires the power to tax a party with attorney's fees in order "to ensure that its processes are not abused by parties asserting frivolous defenses" and "to keep its docket clear." To the extent that the power to shift fees is justified as a deterrent to frivolous litigation, however, the power is punitive and therefore beyond the Board's delegated authority. See *Hall* v. *Cole*, 412 U.S. 1, 5 (1973) (underlying rationale of fee shifting in cases of bad faith is punitive).

The Supreme Court has consistently invalidated Board orders that are not directly related to the effectuation of the purposes of the Act or are punitive. In *Consolidated Edison* v. *NLRB*, 305 U.S. 197 (1938), the Court held that the Board lacks authority to invalidate a contract between a labor organization and a company because the "authority to order affirmative action does not go so far as to confer a punitive jurisdiction" upon the Board. Thus, the Board may not "inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the

policies of the Act might be effectuated by such an order." *Id.* at 235-36. Likewise, in *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7 (1940), the Court invalidated a Board order requiring an employer to deduct from back pay the amount of money that employees had earned on work relief projects prior to their reinstatement and to pay the same amount to the government agencies that had employed the workers. The Court rejected the Board's claim to authority because neither possible rationale for the order—to further the programs to which the money would go or to punish the employer—is consistent with "the spirit and remedial purposes of the Act." *Id.* at 11. Finally, in *Carpenters Local 60* v. *NLRB*, 365 U.S. 651 (1961), the Court struck down as punitive a Board order that a union reimburse its members for all dues and fees that it had collected under an unlawful closed-shop agreement. As Justice Harlan's concurrence in that case makes clear, in order to uphold a remedy, the Board "must show more than that the remedy will tend to deter unfair labor practices." *Id.* at 658. *See also Grondorf, Field, Black & Co.* v. *NLRB*, 107 F.3d 882, 888 (D. C. Cir. 1997) (Board order must be remanded if it may be punitive rather than remedial). Whether the Frontier's misconduct lay in its presentation of a frivolous defense to an unfair labor practice charge or in its misconduct during bargaining, or both, a fair reading of the Supreme Court's decisions suggests to us that the order that the employer pay its adversaries' attorney's fees is punitive and is not directly related to effectuating the policies of the Act.***

*** The intervenor, but not the Board, draws our attention to *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731

III. Conclusion

The American Rule is "deeply rooted in our history and in congressional policy." *Alyeska*, 421 U.S. at 271. Therefore, we may not lightly allow an administrative agency, any more than a court, to depart from the Rule; rather, there must be "clear support" for the agency's claim that the Congress authorized the agency to order one party to pay the fees of another party or of the agency itself. Finding no such support in the terms or the legislative history of § 10(c) of the National Labor Relations Act, we conclude that the Board lacks that authority. We note with interest, moreover, that notwithstanding the protestations of our dissenting colleague, neither she nor the Board can cite a single case, aside from our own pre-*Alyeska* precedent, in which a court has upheld any agency order shifting responsibility for attorney's fees in an agency proceeding.

(1983), but it misconstrues that case: "after *Summit [Valley] Industries*," it says, "the Supreme Court specifically recognized that the Board's authority under § 10(c) includes the authority to order an employer held to have commited an unfair labor practice to pay 'the employees[']. . . attorneys' fees and other expenses.'" Intervenor's Brief at 8, *quoting Bill Johnson's*, 461 U.S. at 747. In *Bill Johnson's*, however, the Supreme Court held only that if a respondent before the Boad files a baseless lawsuit against the charging party in retaliation for the latter's exercise of its rights under the NLRA, then the prosecution of that lawsuit is itself an unfair labor practice, remediable by an order that the respondent cease and desist and pay the costs of defending against the baseless lawsuit—not the costs of participating in the unfair labor practice proceeding itself. Accordingly, *Bill Johnson's* is not relevant to our decision today.

Accordingly, we hold that although the Board may order a respondent to pay the negotiation costs incurred by a charging party if it properly finds, as it did here, that the respondent engaged in aggravated misconduct, the Board may not order a respondent to pay the litigation expenses incurred by the charging party or by the General Counsel in the subsequent unfair labor practice proceeding. Consistent with the foregoing opinion, the Company's petition and the Board's cross-application are each granted in part and denied in part.

So ordered.

WALD, *Circuit Judge*, dissenting in part: I dissent from the panel's reversal of the Board's assessment of attorney's fees against Unbelievable, Inc., for its frivolous defense against the charge of bad faith bargaining before the Board.

The National Labor Relations Board ("NLRB" or "Board") first ordered a respondent to reimburse litigation costs, including attorney's fees, in proceedings before it 25 years ago, citing its statutory authority to effectuate the policies of the National Labor Relations Act ("NLRA" or "Act"). In *Tiidee Products, Inc.*, 194 N.L.R.B. 1234, 1236-37 (1972) (supplemental decision), the respondent had engaged in "patently frivolous" litigation and "[t]he policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available." *Id.*[1] We approved the action of the Board in awarding litigation costs for its proceedings under such circumstances in *Food Store Employees Union v. NLRB*, 476 F.2d 546 (D.C. Cir. 1973), *rev'd in part on other grounds*, 417 U.S. 1 (1974) ("*Food Store*").

Soon thereafter, in *International Union of Elec., Radio and Mach. Workers v. NLRB*, we reaffirmed the Board's authority to award attorney's fees in similar circumstances. *International Union of Elec., Radio and Mach. Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974) (enforcing *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 and *Tiidee Products, Inc.*, 196 N.L.R.B.

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[1] The Board indicated that litigation costs and expenses include: reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses.

158 (1972)), *cert. denied*, 421 U.S. 991 (1975). Judge MacKinnon, writing for the court at that time, acknowledged that "*Food Store* in large measure controls our disposition of the issue in this case," *id.* at 352-54, and said in a separate statement that *Food Store* foreclosed debate on whether the Board has authority to award litigation costs. *Id.* at 352 n.*. Indeed, it is still the rule 23 years later that panels of this court are bound by controlling circuit precedent—even if the panel does not agree with it, *see United States v. Kolter*, 71 F.3d 425, 431 (D.C. Cir. 1995) (Ginsburg, J.)—and a panel decision may be overruled only by the full court, sitting *in banc*, or the Supreme Court. *See, e.g., LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996).

The majority contends nonetheless that *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and *Summit Valley Indus., Inc.* v. *Carpenters Local 112*, 456 U.S. 717 (1982), release us from the obligation to follow precedent upholding the NLRB's authority under section 10(c) of the NLRA to award litigation expenses for frivolous positions because those intervening Supreme Court rulings require an express statutory authorization for fee-shifting that cannot be found in section 10(c). In my view, these cases do not overrule *Food Store*, and I would again uphold the Board's assessment of attorney's fees here.

In *Alyeska*, the Supreme Court held that a successful plaintiff acting as a "private attorney general" in bringing suit to bar construction of the trans-Alaska pipeline under the Mineral Leasing Act, 30 U.S.C. § 185, and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, is not entitled to attorney's fees

even though the litigation may have implemented important public policy goals. *Alyeska*, 421 U.S. at 263-64. The Court explained that "it would be difficult . . . for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorney's fees only in connection with the former," *id.* at 264, a much narrower rule than the majority suggests. Critically, the Court explicitly left intact the equitable power to award attorney's fees under pre-existing common-law exceptions to the American Rule against fee-shifting. *Id.* at 257-58; *see, e.g., Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885) (common fund); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923) (willful disobedience of a court order); *Vaughan v. Atkinson*, 369 U.S. 527 (1962) (bad faith).[2]

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[2] The majority's observation that, subsequent to *Alyeska*, Congress enacted a number of fee-shifting provisions in civil rights statutes, Majority opinion ("Maj. op.") at 14, proves only that Congress wished to actively encourage private attorneys general to enforce those statutes. *See* S. REP. No. 94-1011, 94th Cong., 2d Sess. 1, 2, 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5909, 5910, 5913. No one has suggested that Congress thought *Alyeska* had eliminated or affected in any way traditional exceptions to the American Rule.

To bolster its contention that attorney's fees may never be awarded under the NLRA in the absence of express statutory authorization, the majority cites several cases in which the Supreme Court found no authorization for fee-shifting. Each one states only the obvious: the American Rule restricts fee-shifting unless there is express statutory authority or an exception applies. As in *Alyeska*, the *Runyon v. McCrary*, 427 U.S. 160 (1976), Court reasoned that, "but for a few well-recognized exceptions not present in these cases," there must be explicit authorization for the recovery of attorney's fees as a cost of

In *Summit Valley*, the Supreme Court did decide that section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187, does not authorize a court to award attorney's fees incurred during prior proceedings before the Board as a remedy in a private damages action. The remedial scheme contemplated by Congress in enacting section 10(c) of the NLRA, however, is dramatically different than section 303 of the LMRA. Section 303 contains an explicit damages provision that entitles an employer who has been injured "in his business or property" by a union's unfair labor practice to "recover the damages by him sustained and the cost of the suit." 29 U.S.C. § 187. Starting with the premise that, under the American Rule, the ordinary meaning of "damages" does not include attorney's fees, the Supreme Court examined the legislative history of section 303(b) and found a

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litigation. *Runyon*, 427 U.S. at 185. In *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974), *see* Maj. op. at 14, the lower court construed the Miller Act to permit an attorney's fees award when the "public policy" of the state in which the lawsuit was brought "allows for the award of fees in similar contexts." *Id.* at 126. The Supreme Court reversed on the ground that there was no evidence of congressional intent to incorporate state law into Miller Act litigation and permitting such incorporation would upset the reasonable expectations of litigants and lead to disparate remedies for different litigants. Finally, the Court explained that although the Miller Act term "sums justly due" does not encompass attorney's fees, the American Rule permits "several exceptions to the general principle that each party should bear the costs of its own legal representation." *Id.* at 129. Thus, I disagree with the majority's suggestion that cases such as *Runyon* and *F.D. Rich* rule out fee-shifting by the Board under the NLRA in the case of bad faith defenses by charged companies. *See* Maj. op. at 13-14.

Senate floor exchange persuasively indicating that the term "damages" was not intended to include attorney's fees in this section either. As the Sixth, Seventh and Ninth Circuits have recognized, *Summit Valley* "rested . . . on factors peculiar to section 303(b) [of the LMRA], which . . . expressly states its remedies and was not intended to encompass attorney's fees, according to the 'persuasive evidence' of congressional intent." *Bennett v. Local Union No. 66, Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union, AFL-CIO*, 958 F.2d 1429, 1440 n.9 (7th Cir. 1992); *see Wilson v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO*, 83 F.3d 747, 754 (6th Cir.), *cert. denied*, 117 S.Ct. 610 (1996); *Zuniga v. United Can Co.*, 812 F.2d 443, 454-55 (9th Cir. 1987). In short, none of the intervening cases relate to the Board's authority under the NLRA to award litigation expenses as a remedy and as a deterrent to prevent bad faith abuse of its processes.

In a case like this one, where an employer has flagrantly refused to collectively bargain in good faith, a union is compelled to vindicate its statutory rights in proceedings before the Board. As the Board itself has recognized, "[a]n aggrieved party's outlay of legal . . . expenses is likely to be a prime ingredient in or motivation behind, a refusal to bargain for which there is no arguably meritorious justification. Logic suggests little reason for such a refusal other than the belief that to do so may create an economic imbalance beneficial to the party undertaking the refusal." *Wellman Industries, Inc.*, 248 N.L.R.B. 325, 326 (1980); *see Seattle-First National Bank v. NLRB*, 638 F.2d 1221, 1227 n.9 (9th Cir. 1981) (surface

bargaining by employer involves use of economic power to "talk a union to death"). Wasting the union's time and depleting its resources through presentation of a frivolous defense at a Board proceeding is a tactical maneuver designed to deepen the economic wound already caused by the surface bargaining. *Koval Press, Inc.*, 241 N.L.R.B. 1261, 1263 (1979) ("The only logical inference to be drawn from [presentation of a frivolous defense is that Respondent] seeks to delay the proper effectuation of the policies of the Act by its unlawful refusal to bargain . . . ."). It is merely continuation of the same bad faith recalcitrance employed at the bargaining table in a new forum. A diehard respondent can go up the chain of decisionmaking causing greater economic burdens to the union at each stage by employing dilatory tactics during the administrative adjudication by the Administrative Law Judge ("ALJ"), the Board's review of the ALJ's recommendation, and, finally, appeal of the Board's order to a United States Court of Appeals. The whole process can take years. In addition to exhausting the charging party's legal war chest, the delay often leads to employee frustration and eventual loss of employee support due to attrition or loss of confidence in a seemingly ineffectual union, and it often permits continued employer anti-union activity. *Cf. Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108 (1970). Ironically, by the purposeful presentation of an entirely frivolous defense, an employer turns the Board's processes into an instrument of its own unlawful conduct. Even though the union wins the usual remedy for surface bargaining—an order to bargain in good faith—the impact of an employer's persistent and pervasive bad faith over years of administrative

proceedings may effectively dissipate the impact of the order.

The majority readily admits the force of the evidence that led the Board to conclude that Unbelievable, Inc., "engaged in egregious and deliberate surface bargaining" in order to diminish the charging parties' economic strength and relied on "frivolous defenses in its litigation" in order to "further deplete[] the Charging Parties' resources and needlessly waste[] the resources of [the NLRB]." The Board characterized Unbelievable's surface bargaining as "flagrant, aggravated, persistent, and pervasive" misconduct, and described the deliberate adherence to frivolous defenses as "egregious bad faith." While relying on section 10(c) of the NLRA as its principal authority for awarding attorney's fees against Unbelievable, Inc., the Board expressly noted such a remedy paralleled the bad faith exception to the American Rule as well.[3] Such a remedy is

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[3] The majority insists that we cannot consider the relevance of the bad faith exception to the American Rule because counsel for the Board at oral argument stated that the Board relied solely on section 10(c) of the NLRA. Whatever the scope or intent of Board counsel's admission, the post hoc rationalization rule works to prevent counsel from adding to or subtracting from an agency's stated rationale. *Ashland Oil, Inc. v. FTC*, 548 F.2d 977 (D.C. Cir. 1976). The Board's opinion clearly states that it "find[s] ample support for [its] conclusion that [its] Order is fully consistent not only with the American Rule, but alternatively with the bad faith exception to that rule."

Ironically, the majority and I may have no real dispute over the Board's ultimate authority to render its ruling in this case. The majority says that it does not rule out the possibility that the Board has the authority to sanction a party that has acted in bad faith. Maj. op. at 10 n*. The Board, however, has only

undoubtedly "rational and consistent with the statute." *NLRB v. Food & Comm'l Workers Union*, 484 U.S. 112, 123 (1987).

Section 10(c) directs the Board, upon finding that a respondent has engaged in unfair labor practices, to issue an order requiring the respondent to cease and desist from the unfair labor practices and authorizes it further "to take such affirmative action including the reinstatement of employees, with or without back pay, as will effectuate the policies of this Act . . . ." 29 U.S.C. § 160(c). The Act's policies include "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives . . . for the purpose of negotiating the terms and conditions of their employment . . . ." 29 U.S.C. § 151.

While section 10(c) does not specifically list reimbursement of litigation expenses before the Board as a remedy for unfair labor practices, Congress deliberately drafted section 10(c) to include all reasonable remedies consistent with the Act's purposes. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188-94 (1941) (Congress left to the NLRB the "adaption of means to

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asserted its authority to assess fees in a frivolous defense case and has never attempted to broaden its authority beyond such circumstances. Thus, the majority's reversal means that, although the Board may well be justified in assessing attorney's fees in this case and, although it specifically cited the bad faith exception to the American Rule as consistent with its ruling, because it relied on its broad authority under section 10(c) to effectuate the purposes of the NLRA as the main support for its action, its action must be nullified. This makes no sense to me.

end" because Congress was unable "to define the whole gamut of remedies to effectuate [the] policies [of the Act] . . . ."). The final version of section 10(c), authorizing "such affirmative actions . . . as will effectuate the policies of [the NLRA]" replaced earlier provisions that had enumerated specific types of remedies available to the Board.[4] The broader language was intended to "delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the [NLRA]." *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 323-24 (1994). *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900-01 (1984); *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Strong*, 393 U.S. 357, 359 (1969); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). The Board's choice of remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*,

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[4] The majority's suggestion that the substitution of "reinstatement of employees, with or without back pay" as an example of an affirmative action in the final bill for the term "restitution," which had appeared in earlier versions, evinced an intent to narrow the discretion of the Board in remedial matters, Maj. op. at 17-18, is wrong. Both "reinstatement" and "restitution" were used only as illustrations of "affirmative actions," in no way intended to confine Board power. Actually, restitution restores to a party property or money of which the party has been deprived, *see* BALLENTINE'S LAW DICTIONARY 1107 (3d ed. 1969), and is thus a backward- looking remedy. Reinstatement with back pay returns a person to a formerly held position and is thus both backward and forward-looking. So, if it signifies anything, the substitution of "reinstatement" signified a broadening of section 10(c) power in the illustration.

319 U.S. 533, 540 (1943). And, "[the court is] obliged to defer heavily to the Board's remedial decisions." *Local 32B-32J, Service Employees Int'l Union, AFL-CIO v. NLRB*, 68 F.3d 490, 496 (D.C. Cir. 1995) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-15 (1969); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 214-17 (1964); *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1981)); *Phelps Dodge*, 313 U.S. at 188 (attainment of the national policies manifested in the NLRA requires "expert administration in collaboration with limited judicial review . . . [that is not] confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.").

There can be scant doubt that awarding attorney's fees to a charging party who has been subjected to surface bargaining and bad faith, frivolous litigation effectuates the policies of the NLRA by directly remedying the economic injury incurred by the party. In this regard, reimbursement for expenses of litigation is no different from compensation for the costs of bad faith negotiation, which the majority approves in this very case.[5] Using baseless, sham litigation to retaliate against or interfere in an employee's exercise of protected rights under the NLRA has been condemned by the Supreme Court as a violation

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[5] The majority contends that an award of litigation expenses as a remedy for bad faith conduct is not closely related to the Board's area of expertise or its statutory mission, but where the award of attorney's fees is targeted at a respondent's attempt to misuse the Board's processes in order to thwart a charging party's ability to bargain, the Board's expertise is very relevant. The impact that bad faith conduct has on a charging party is directly in the domain of the Board, which deals daily with the dynamics of employer-union relationships.

of the NLRA and the Court has approved the Board's using its section 10(c) authority to order "the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses . . . [and] order any other proper relief that would effectuate the policies of the [NLRA]." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 747 (1983). The Court further noted in *Bill Johnson's* that the Board needed such power despite the availability of state-court malicious prosecution remedies because the Federal Government has its own strong interest in enforcing the federal labor laws. *Id.* at 747 n.14. As the Seventh Circuit recently recognized in a case enforcing the Board's grant of attorney's fees for a frivolous state court suit:

> Whether a union is subject to frivolous litigation as a part of the underlying unfair labor practice or during the adjudication of another unfair labor practice allegation, there can be a similar impact on the rights of the workers under the Act.
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> * * * * *
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> A baseless and retaliatory lawsuit against a union can be a powerful weapon in the hands of an unprincipled employer. Such an employer need not win its lawsuit against a union to thwart the Union's attempts to organize workers; rather, the employer need only impose substantial costs and delays upon the Union.

Geske & Sons, Inc. v. NLRB, 103 F.3d 1366, 1378-79 (7th Cir. 1997). The tactic is the same whether the litigant is before the Board or in court; only the

forum differs.[6] It would be an anomalous result indeed if bad faith negotiation can be remedied by a grant of

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[6] Although a charging party is not legally required to litigate its case before the Board, the Board's rules and regulations assume that the charging party is a fully participating party in the litigation. Enforcement of the NLRA relies solely on the initiation of charges by the charging party. *NLRB v. Food and Comm'l Workers Union*, 484 U.S. at 118. The term "party" as used in the Board's regulations includes "without limitation, any person filing a charge or petition under the [NLRA] . . . ." 29 C.F.R. § 102.8. Thus, a charging party need not take any action in order to participate fully in Board proceedings. "Any person desiring to intervene in any proceeding," on the other hand, must explicitly move for permission to intervene. *Id.* § 102.29.

The charging party plays an integral role in the entire NLRA proceedings. The initial obligation to identify and serve an unfair labor practice charge falls upon the charging party. *Id.* § 102.14. In addition, "[i]f, after the charge has been filed, the regional director [of the NLRB] declines to issue a complaint . . . [or withdraws a complaint, the charging party] may obtain a review of such action by filing an appeal with the general counsel." *Id.* § 102.19. If the Regional Director of the NLRB and the respondent agree to a settlement, the charging party has a right to object to the regional director, the General Counsel and in certain cases the Board. *Id.* § 101.9.

Once formal proceedings have begun, a charging party is treated just like any other party. It may take depositions in connection with Board proceedings, *id.* § 102.30, and may subpoena witnesses and documents, *id.* § 102.31, just like the General Counsel and the respondent. Charging parties have the right to appear at the hearing and to examine and cross examine witnesses. *Id.* § 102.38. It may file briefs and files exceptions to the administrative law judge's findings. *Id.* §§ 102.42, 102.46.

These rules demonstrate that a charging party is expected to be a principal participant in the litigation of the charged unfair labor practice. The prosecution of an unfair labor practice is designed primarily to remedy the victim. Victims

attorney's fees, and bad faith court proceedings as well, but bad faith Board proceedings merit no comparable remedy.

Fee-shifting power has been exercised by the Board only in cases that fall within the confines of the bad faith exception to the American Rule. In the few cases in which the Board has exercised it, the offending parties have acted outrageously in flaunting the Act's directives and abusing the Board's processes. *See, e.g., Texas Super Foods*, 303 N.L.R.B. 209 (1991); *Autoprod, Inc.*, 265 N.L.R.B. No. 42 (1982); *Wellman Industries, Inc.*, 248 N.L.R.B. 325; *Koval Press, Inc.*, 241 N.L.R.B. 1261. Paradoxically, the majority uses the Board's reimbursement of expenses for its own proceedings to argue that it has exercised its power for punitive rather than remedial reasons, a power not included within its authority to effectuate the policies of the NLRA. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). This sounds like double-speak to me. When Congress determined that an aggrieved party must present unfair labor practices to the NLRB rather than to a court, surely it did not intend for the NLRB to become a dupe, exploitable at will by employers to intensify the harm stemming from their original violation of the labor laws. Inherent in any agency's authority to carry out its designated functions is the power to ensure the fairness, efficiency and integrity of its processes and the appropriateness of the conduct of the parties appearing before it. *See Checkovsky v. SEC*, 23 F.3d

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of unfair labor practices have no other remedy but to invoke the Board's authority. They cannot turn initially to civil courts. They must rely on and actually assist the Board's counsel in making their case.

452, 455 (D.C. Cir. 1994) (Silberman, J., concurring); *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979). Moreover, decisions of the NLRB are reviewed and enforced by the courts and conduct that dishonors and undermines the Board's processes dishonors and undermines the review process as well. *Cf. ABF Freight System, Inc. v. NLRB*, 510 U.S. at 326 (Scalia, J., concurring). An agency's power to protect the integrity of its processes has not been held to be limited to the sanctions specifically provided by the statute that defines the agency's power to remedy violations of law. *See, e.g., NLRB v. C.H. Sprague & Son Co.*, 428 F.2d 938 (1st Cir. 1970); *NLRB v. American Art Indus., Inc.*, 415 F.2d 1223 (5th Cir. 1969); *Uniroyal v. Marshall*, 482 F. Supp. 364 (D.D.C. 1979); *see also Checkovsky*, 23 F.3d at 455-56 (agencies have inherent power to discipline officials appearing before the agency because it protects the administrative process and thus is reasonably related to the purposes of the laws that the agency is entrusted to enforce) (Silberman, J., concurring); *Touche Ross & Co.*, 609 F.2d at 582 (agency disciplinary rules authorized despite the absence of express statutory authority in order to protect the integrity of agency's own processes); *Gonzalez v. Freeman*, 334 F.2d 570, 576-77 (D.C. Cir. 1964) (Commodity Credit Corporation may debar irresponsible, defaulting or dishonest contractor despite the absence of explicit congressional authorization because such action is a necessary means for accomplishing congressional purpose of developing foreign markets for agricultural commodities). The imposition of attorney's fees on a party who grossly abuses the Board's processes is a defensive measure, equally justifiable as these other examples when invoked to protect the agency's

integrity and to deter future abuses and distortion of its resources from more worthy cases.

In sum, I can find no convincing reason why the Board should not be allowed to construe its remedial mandate in section 10(c) so as to include an award of attorney's fees in a proceeding where a party has presented a frivolous defense to a serious unfair labor practice charge and in so doing has depleted the union's treasury, time and effectiveness, and misused the Board's process. We affirmed the Board's authority to do just that 24 years ago and I can find nothing in intervening Supreme Court cases that conflicts with such an interpretation by the Board of its authority. I respectfully dissent from that portion of the majority opinion holding to the contrary.

(6)

Supreme Court, U.S.
FILED
AUG 14 1997
CLERK

No. 96-1740

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GESKE & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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1. The recently decided case of *Unbelievable, Inc. v. NLRB*, No. 96-1209 (D.C. Cir. July 18, 1997), does not affirm the Board's power to "award attorneys' fees as damages" as alleged. Supp. at 2. The decision also does not "undercut[] petitioner's suggestion" of a circuit court conflict. Supp. at 2. In fact, neither point is addressed by the D.C. Circuit in *Unbelievable, Inc.* That the Board resorts to quoting the dissent of Judge Wald as direct support for Board orders of fee reimbursement in "baseless litigation" cases, accentuates the need for this Court's supervisory review here.

As the majority in *Unbelievable, Inc.* carefully explained, that case is first and foremost one where the union is a certified bargaining representative, an employee had been fired for engaging in protected activity, and the employer had engaged in surface bargaining. The Board had ordered the employer to pay the union's bargaining expenses and also to pay the union's and General Counsel's attorneys' fees for expenses incurred before the Board.

As the D.C. Circuit observed and as Petitioner Geske had pointed out in its Petition at 23, the Board had previously ordered fees only where defenses before it were "frivolous rather than debatable." 7a. If the defense turned on issues of credibility, the case could not be frivolous. 7a-8a; Pet. at 23. After reviewing the caselaw of this Court, especially *Summit Valley Ind., Inc. v. Carpenters*, 456 U.S. 717 (1982) and *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), and *J.P. Stevens & Co., Inc. v. NLRB*, 458 U.S. 1118 (1982), *vacating*, 668 F.2d 767 (4th Cir) (where the circuit court approved a Board litigation fee award), the D.C. Circuit concluded that the Board could order the employer to reimburse union negotiating expenses, but lacked the authority to order it to pay the litigation expenses of the charging party or the General Counsel inasmuch as the negotiating cost remedy involves the Board's expertise in labor relations whereas the fees "remedy" is punitive and outside the agency's expertise. *Unbelievable, Inc.*, Supp. at 24a.[1]

On these rulings, the Board claims that the *Unbelievable, Inc.* decision reaffirms its powers under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), despite the fact that the Board admits it intends to ask for a rehearing in *Unbelievable, Inc.* Supp. at 2 n2. However, *Bill Johnson's Restaurants* played no central role in the D.C. Circuit's holding. In a footnote only did the *Unbelievable, Inc.* Court cite *Bill Johnson's Restaurants* and only because the intervenor union "misconstrue[d] that case." Supp. 26a-27a n.***.

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[1]The Board admits that its fee award was imposed "as *damages*" against Geske. Supp. at 2. This punitive action is contrary to *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940) and *Wisconsin Dep't of Ind. v. Gould, Inc.*, 475 U.S. 282, 288 n.5 (1986), where the Court explained that "[t]he regulatory scheme established for labor relations by Congress is 'essentially remedial,' and the Board is not generally authorized to impose penalties for the purpose of deterrence or retribution." The Seventh Circuit below rested its ruling in favor of Board authority to award fees to an uncertified union, upon "[a]n adequate deterrent" and "an economic disincentive for engaging in such conduct," because a union may play a "part" in organizing employees. 22a-23a. Both reasons are punitive factors and not in harmony with an Agency remedial order that acts to make whole employees and to protect a specific Section 7 right that has been transgressed. Neither remedial purpose is or has been asserted here.

Accordingly, the holding in *Unbelievable, Inc.*, does nothing to dispute the conflict caused by the Seventh Circuit in *Geske & Sons, Inc. v. NLRB* with the decision of the Sixth Circuit in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237 (6th Cir. 1995). The dispute is firmly cast between the Board's new assumption of power to award fees to any person, including uncertified labor unions under *Bill Johnson's Restaurants* and its rejection of the limitation that the failure to possess Section 7 rights is "a distinction 'of substance'" between employees and nonemployees under the Labor Act, as found by the Court. *Lechmere, Inc.*, 502 U.S. 527, 537 (1992).

2. Since the Board brought the *Unbelievable, Inc.* decision to the Court's attention, the Court is aware that the D.C. Circuit has now categorically rejected Board authority under Section 10(c) of the Labor Act for imposing attorneys' fees as a remedy for litigation before it. In doing so, the court found when the Board makes such an award it "moves away from its expertise in labor relations and exercises a discretionary power entrusted to a court only when specifically legislated." Supp. at 23a. It observed that the Board's efforts to issue fee awards "focuses not upon the dynamics of the workplace but upon the employer's (or union's) conduct in litigation." Supp. at 24a. These reasons it found are outside the agency's expertise. *Id.*

The rationale for permitting Board fee awards also flies headward into the rationale for preserving the American Rule—that it depletes the resources of a party and would serve as a deterrent to frivolous litigation. Supp. at 23-24a. The former is a general criticism of the American Rule the Court previously rejected in *Summit Valley*, 456 U.S. at 725. As to the latter: "[t]o the extent that the power to shift fees is justified as a deterrent to frivolous litigation, however, the power is punitive and therefore beyond the Board's delegated authority." *Id.* at 724; Supp. at 25a.[2]

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[2]Because *Unbelievable, Inc.*, represents a "substantial change" in controlling caselaw, it qualifies as an extraordinary circumstance for consideration here. *Sure-Tan, Inc.*, 467 U.S. at 896 n.7. The issue also comprises a "subsidiary question" within the meaning of Supreme Court Rule

(continued...)

These same reasons, to the extent that they are accepted by the Court, draw into question the fundamental issue whether the fee remedy announced in *Bill Johnson's Restaurants* should be reconsidered. The entire discussion in *Bill Johnson's Restaurants* addressed the Board's ability to issue a cease and desist order to end the state litigation. Only in one sentence at 731 U.S. at 747, did the Court state the "Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses." Given that the Court undertook no analysis of the remedy the Board might *potentially* award there, under the reasoning of the D.C. Circuit, there should be no such remedy possible, because "[e]ven assuming that attorney's fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority." *Summit Valley*, 456 U.S. at 724-25.[3]

Since the Labor Act is silent in both Sections Section 10(c) and 303 on the question of fees, to impose them via congressional silence through Board discretion ("affirmative action") is inconsistent with the Court's holding in *Summit Valley*. "Any perceived deficiencies in the NLRA's existing remedial arsenal *can only* be addressed by congressional action." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984) (also explaining the Court's concern that *Bill Johnson's Restaurants* was not intended to deprive an employer access to a state remedy for state injuries, 467 U.S. at 896-98) (emphasis added). The anomaly between the Board's silent statutory

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[2](...continued)
14.1(a) and is addressed in Geske's *Amended Revised Exception 84* to the Board, as well.

[3]The fees question has fully escaped appellate review. In *Makro, Inc. (dba Loehmann's Plaza)*, 305 N.L.R.B. 663, 671 (1991), the Board first imposed an attroneys' fee award against an employer for its lawsuit to prevent union trespass. Because of *Lechmere, Inc. v. NLRB*, the case was returned from the Sixth Circuit and from there, resurfaced in 1995 in *Makro II*, 316 N.L.R.B. No. 24 (1995), *aff'd, United Food & Comm. Workers, Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996). In *Makro II*, the Board dismissed the ULP complaints, but reaffirmed its 1991 fee award analysis in *Makro I*. Hence, the methodology has never been reviewed. This history is reviewed by the ALJ at Pet. 99a-101a.

power to award fees under *Bill Johnson's Restaurants*, its inability to award in all other situations, and the Court's holding that "full compensation" is not an objective of the Labor Act or the American Rule in *Summit Valley*, is obvious.

It would also be anomalous for the Board to be empowered by Section 10(c) to award attorneys' fees as a remedy for a union violation of the secondary boycott provision of Section 8(b)(4), 29 U.S.C. §158(b)(4), of the Labor Act, whereas the federal courts cannot impose the same remedy for violations through its concurrent jurisdiction over secondary boycotts under Section 187, 29 U.S.C. § 303, under *Summit Valley*.

This case raises important questions concerning the Labor Act's remedies that require this Court's attention.

* * * * *

The petition for a writ of certiorari issue should be granted for the reasons set out herein and in the Petition.

Respectfully submitted,

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Dated: August 14, 1997